



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

**HARVARD LAW LIBRARY**







33

THE  
OHIO NISI PRIUS REPORTS

NEW SERIES. VOLUME XIII.

---

BEING REPORTS OF CASES DECIDED

BY THE

SUPERIOR, COMMON PLEAS, PROBATE AND  
INSOLVENCY COURTS OF THE  
STATE OF OHIO.

---

VINTON R. SHEPARD, EDITOR.

---

CINCINNATI:  
THE OHIO LAW REPORTER COMPANY.  
1913.

---

---

**COPYRIGHT, 1913,  
BY THE OHIO LAW REPORTER COMPANY.**

---

---

**MAY 15 1918**

## TABLE OF CASES.

---

Ader v. Helmbold .....	217	Chew v. Grieve .....	358
Akron, McCourt v. ....	537	Christ v. Cuyahoga County	
Albers, Herman v. ....	98	Commissioners .....	457
Alcorn v. Price .....	558	Christ v. Elrich .....	457
American Express Co., Social-		Cincinnati Bickford Tool Co.,	
istic Publishing Co. v. ....	403	Schaefer v. ....	553
American Soap Co., Walter v.	307	Cincinnati v. C., G. & P. Ry. ..	265
Anderson v. Miller .....	42	Cincinnati v. C., L. & N. Ry. ..	276
Applegate v. C. & H. Turnpike		Cincinnati v. Fogarty .....	631
Co. ....	486	Cincinnati, Wuest v. ....	249
Archer v. Mt. Gilead .....	373	Cincinnati Equipment Co. v.	
Assignment of Davies .....	105	Kauffman .....	59
Atkins. Pearce v. ....	580	Cincinnati Gymnasium v. Ed-	
Aulen v. Cantor .....	599	mondson .....	489
		Cincinnati & Harrison Turn-	
Bagley v. C., G. & P. Ry. ....	679	pike Co., Applegate v. ....	486
Beckman v. Newark .....	519	Cincinnati, McWilliams &	
Benner, Fowler v. ....	313	Schulte v. ....	467
Blanton v. Burroughs Adding		Cincinnati Traction Co., Car-	
Machine Co. ....	423	penter v. ....	81
Bloomfield, State v. ....	121	Cincinnati Traction Co., Reis v.	166
Blinn & Co., Lyric Piano Co. v.	521	Cincinnati Traction Co.,	
B. & O. Ry., Hulshizer v. ....	497	Shields v. ....	133
Boswell v. Security Life Insur-		Cleveland, Drum v. ....	281
ance Co. ....	364	Cleveland v. Cleveland Stone	
Brooks v. Columbus Ry. &		Co. ....	209
Light Co. ....	501	Clinton Telephone Co. v. New	
Brownsville Telephone Co.,		Burlington Telephone Co. ..	61
Gratlot & Brownsville Tele-		Cloud v. Millikin National	
phone Co. v. ....	429	Bank .....	259
Bryson, Lepps v. ....	33	Colerain B. & L. Co. v. Hosea	244
Burger, Sucher v. ....	161	Collins v. Collins .....	114
Burroughs Adding Machine		Columbus, Burns v. ....	508
Co., Blanton v. ....	423	Columbus v. Federal Gas &	
Burns v. Columbus .....	508	Fuel Co. ....	394
		Columbus Huling v. ....	409
C., G. & P. Ry., Bagley v. ....	679	Columbus Ry. & Light Co.,	
C., G. & P. Ry., Cincinnati v.	265	Brook v. ....	501
C., L. & N. Ry., Cincinnati v. .	276	Conklin v. Tyler .....	441
C. & P. Ry., State v. ....	671	County Commissioners, Se-	
C. N. & C. Ry. v. Edmondson	377	ver v. ....	585
Campbell, In re .....	278	County Commissioners, State	
Campbell, In re .....	386	ex rel v. ....	246
Cantor, Aulen v. ....	599	Cox v. Hulsmire .....	532
Carpenter v. Cincinnati Trac-		Crawford, Parkinson v. ....	73
tion Co. ....	81	Cush, Mead v. ....	470

## TABLE OF CASES.

Cuyahoga County Commissioners, Christ v. ....	457	Hulshizer v. B. & O. Ry. ....	497
		Hulsmire, Cox v. ....	532
Davies, Assignment of .....	105	Illinois Supply Co. v. Whitman .....	562
Dickman v. Wood .....	271	I. N. Price Co. v. Erie Railroad Co. ....	65
Dixon, In re .....	325	In re Campbell .....	278
Drum v. Cleveland .....	281	In re Campbell .....	386
Drumm v. North American Oil & Gas Co. ....	453	In re Dixon .....	325
Dunlap, In re .....	325	In re Dunlap .....	325
Edmondson, C., N. & C. Ry. Co. v. ....	377	In re Fitzsimmons .....	104
Edmondson, Cincinnati Gymnasium v. ....	489	In re Jennings .....	186
Elrich, Christ v. ....	457	In re Steward .....	325
Elmore, Moore v. ....	651	In re Zacharow .....	119
Erie Railroad Co., I. N. Price Co. v. ....	65	In re Patent Wood Keg Co. ..	321
Estate of Jennings .....	186	In re Petition of Lounsberry under the Jones Law .....	582
Eustis Keyler v. ....	601	In re Smith .....	278
Evans, Robson v. ....	326	Interurban Ry. Cincinnati v. ....	265
Ex Parte Campbell .....	278	Jennings, Estate of .....	186
Ex Parte Smith .....	278	John Hauck Brewing Co. v. Taft' .....	215
Fayette County Commissioners, Sever v. ....	585	Johnson v. Policemen's Benevolent Association .....	568
Federal Gas & Fuel Co., Columbus v. ....	394	Joseph Goldberger Iron Co., Market National Bank v. ..	27
First Presbyterian Society, Prather v. ....	169	Journeymen Horseshoers v. Master Horseshoers .....	297
Fitzsimmons, In re .....	104	Kauffman, Cincinnati Equipment Co. v. ....	59
Fogarty, Cincinnati v. ....	631	Keyler v. Eustis .....	601
Fowler v. Benner .....	313	King v. P., C., C. & St. L. Ry. ....	201
Frank, Sullivan v. ....	505	King, Tuttle v. ....	547
Friend v. Friend Paper Co. ..	425	Kratz v. Risch .....	478
Fulton v. Spear & Co. ....	473		
Goldberger Iron Co., Market National Bank v. ....	27	L. S. & M. S. Ry., Westfall v. ....	217
Gratiot & Brownville Telephone Co. v. Brownville Telephone Co. ....	429	Lake View Land Co., Hedley v. ....	523
Graves v. McNulty .....	110	Lepps v. Bryson .....	33
Grieve, Chew v. ....	358	Licking County Commissioners, State ex rel v. ....	246
Gunkelman, State v. ....	665	Lockwood v. Whittlesey .....	233
Haller, Williams v. ....	329	Lounsberry, In re Petition of, under the Jones Law .....	582
Hauck Brewing Co. v. Taft ..	215	Lyric Piano Co. v. W. H. Blinn & Co. ....	521
Hedley vs Lake View Land Co. ....	523	McCourt v. Akron .....	537
Helmbold, Wilson v. ....	222	McNulte, Graves v. ....	110
Herman v. Albers ..	98	McWilliams & Schulte v. Cincinnati .....	467
Hirsch v. Hunt .....	137	Market National Bank v. Goldberger Iron Co. ....	27
Holtz, Stoltz v. ....	230		
Hosea, Colerain B. & L. Co. v. ....	244		
Hunt, Hirsch v. ....	137		
Huling v. Columbus .....	409		



# TABLE OF CASES.

v

Master Horseshoers, Journey- men Horseshoers v. ....	297	Robson v. Evans .....	326
Mead v. Cush .....	470	Roth, Southern Railway Trus- tees v. ....	633
Metzger v. Zeissler .....	49	Richards v. Richards .....	153
Miller, Anderson v. ....	42	Risch, Kratz v. ....	478
Miller v. Miller .....	1	Schaefer v. Cincinnati Bick- ford Tool Co. ....	553
Miller v. Veldhuysen .....	546	Security Life Insurance Co., Boswell v. ....	364
Millikin National Bank, Cloud v. ....	259	Sever v. Commissioners Fay- ette County .....	585
Moore v. Village of Elmore ..	651	Shannon v. Shannon .....	193
Morton v. Painters Union ...	311	Shields v. Cincinnati Trac- tion Co. ....	133
Mt. Gilead, Archer v. ....	373	Sign Writers' Union, Mor- ton v. ....	311
Newark, Beckman v. ....	519	Smith, In re .....	278
Newark v. Ohio Electric Ry... 487		Socialistic Publishing Co. v. American Express Co. ....	403
New Burlington Mutual Tele- phone Co., Clinton Tele- phone Co. v. ....	61	Southern Railway Trustees v. Roth .....	633
Norris, State v. ....	199	Spear & Co., Fulton v. ....	473
North American Oil & Gas Co., Drumm v. ....	453	State v. Bloomfield .....	121
Ohio Electric Ry., Newark v. . 487		State v. Cleveland & Pittsburg Ry. ....	671
Ohio Electric Ry., Wein- gerter v. ....	659	State v. Norris .....	199
P., C., C. & St. L. Ry., Cincin- nati v. ....	276	State ex rel v. County Commis- sioners .....	246
P., C., C. & St. L. Ry., King v. 201		State ex rel v. Weyand .....	198
P., C. C. & St. L. Ry., State v. 145		State v. P., C., C. & St. L. Ry. 145	
Painters' Union, Morton v. ... 311		State v. Gunkelman .....	665
Parkinson v. Crawford .....	73	State v. Pohlman .....	254
Patent Wood Keg Co., In re .. 321		Steward, In re .....	325
Pearce v. Atkins .....	580	Stewart, Stomps v. ....	449
Peaslee, Wright v. ....	662	Stoltz v. Holtz .....	230
Proeger v. Helmbold .....	217	Stomps v. Stewart .....	449
Pohlman, State v. ....	254	Stover v. Stover .....	550
Policemen's Benevolent Asso- ciation, Johnson v. ....	568	Sucner v. Burger .....	161
Prather v. First Presbyterian Society .....	169	Sullivan v. Frank .....	505
Price, Alcorn v. ....	558	Taft, John Hauck Brewing Co. v. ....	215
Price Co. v. Erie Railroad Co. 65		Thomas v. Webber .....	301
Railway, Bagley v. ....	679	Trustees Southern Railway v. Roth .....	633
Railway, Brook v. ....	501	Turnpike Co., Applegate v. .. 486	
Railway, Cincinnati v. ....	276	Tuttle v. King .....	547
Railway, Cincinnati v. ....	265	Tyler, Conklin v. ....	441
Railway v. Edmondson .....	377	Veldhuysen, Miller v. ....	546
Railway, Hulshizer v. ....	497	Village of Elmore, Moore v. .. 651	
Railway, King v. ....	201	Walter v. American Soap Co. 307	
Railway, Newark v. ....	487	Webber, Thomas v. ....	301
Railway, State v. ....	671	Weingerter v. Ohio Electric Ry. ....	659
Railway, Weingerter v. ....	659	Westfall v. L. S. & M. S. Ry. . 217	
Railway, Westfall v. ....	217		
Reis v. Cincinnati Traction Co. 166			
Robinson v. Robinson .....	613		

## TABLE OF CASES.

Weyand, State ex rel v. ....	198	Wood, Dickman v. ....	271
Whittlesey, Lockwood v. ....	233	Wright v. Peaslee ....	662
Whitman, Illinois Supply		Wuest v. Cincinnati ....	249
Co. v. ....	562		
Williams v. Haller ....	329	Zacharow, In re ....	119
Wilson v. Helmbold ....	222	Zeissler, Metzger v. ....	49

# OHIO NISI PRIUS REPORTS

NEW SERIES—VOLUME XIII.

---

CAUSES ARGUED AND DETERMINED IN THE SUPERIOR,  
COMMON PLEAS, PROBATE AND INSOLVENCY  
COURTS OF OHIO.

---

## **APPORTIONMENT OF STOCK DIVIDENDS BETWEEN LIFE TENANTS AND REMAINDERMEN.**

Common Pleas Court of Cuyahoga County.

HENRY C. MILLER AND SAMUEL C. D. JOHNS, TRUSTEES OF THE  
ESTATE OF N. E. CHAPMAN, DECEASED, v. MORTIMER H.  
MILLER ET AL.

Decided, May 10, 1912.

*Distribution—Where Stocks Placed by Testator in Trust—Increased  
Enormously in Value Through Segregation of Surplus Earnings—  
Widow and Son Made Beneficiaries for Life—With Remainder to  
“Lawful Heirs”—Entire Proceeds Held to Belong to the Trust Fund  
—Consideration of the Massachusetts and the American Rules as  
to Distribution Between Life Tenants and Remaindermen—Wills—  
Residence of Testator—Construction of the Phrase “Lawful Heirs”  
—Evidence.*

1. In an action to construe a will the question of the competency of witnesses will be limited to matters pertaining to the estate, without regard to the fact that such witnesses may be interested adversely in the final distribution.
2. Where the question of the legal domicile of the testator is in doubt, and it does not appear that at the time of his removal from Ohio it was his intention to make his new home his permanent resi-

- dence, and from the facts as presented the probate court might well have reached the conclusion that at the time of his death the testator was a resident of Ohio, the question as to his residence can not be subsequently raised in an action to construe the will, and distribution of the estate will be made under the laws of Ohio.
3. By the term "lawful heirs" as used in the will under consideration the testator referred to brothers and sisters of both his wife and himself as a class, and the gifts under his will were direct, and the distribution should be made among those living at the time of his own death and the death of his wife respectively *per stirpes*.
  4. Representatives of life tenants are entitled on final distribution to receive that portion of the fund in the hands of the trustee which should have been distributed to the life tenants during their lives as income from the trust fund.
  5. The apportionment of the proceeds from the sale and liquidation of what was originally the Latrobe Steel Works was made, not as earnings, but as the proceeds from sale of the entire assets and working capital of the company which eventually succeeded to the property and capital of the Latrobe Steel Works; and upon distribution of that part of said proceeds paid to the trustee of a deceased stockholder of the Latrobe Company, the entire amount will be treated as belonging to the trust estate, and not as income, and as between the remaindermen and representatives of the life tenants will be paid over to the remaindermen.

*Stearns, Chamberlain & Royan*, for plaintiffs.

*Westenhaver, Boyd, Rudolph & Brooks, Hoyt, Dustin, Kelley, McKeehan & Andrews* and *Little, McArthur & Dunnebake*, contra.

CHAPMAN, J.

The above entitled action was brought by the trustees for the purpose of obtaining a construction of the will of Nathan E. Chapman, deceased, who died January 13, 1893.

In general terms, the decedent's will provided that all of his estate of which he died seized should be held by the trustees, with power to sell, dispose of or collect all of said securities, and invest and reinvest the proceeds thereof, and, after paying expenses, to pay the entire net income from the estate to his wife during her life, and, if necessary in the judgment of the trustees, to use part or all of the principal for the care and support of his wife; with the provision that after the death of the

1912.]

Miller et al v. Miller et al.

wife, the net income should be paid to the son, Harry E. Chapman, during his life; and after the death of this son without living issue, then the estate should go one-half to the lawful heirs of the testator and one-half to the lawful heirs of the testator's wife.

From the admissions of the pleadings and the evidence, it appears that the testator's wife, Fannie Chapman, made application for admission of the will to probate in Cuyahoga county, Ohio, and the same was thereafter admitted to probate.

The said widow lived until the 10th day of March, 1908, and the said son, Harry E. Chapman, died on the 17th day of November, 1910, without issue living at his death, but leaving a widow, Caroline S. Chapman, who is one of the parties defendant.

The testator, Nathan E. Chapman, had four brothers and one sister, namely, William H. Chapman, who died August 18, 1895; Nelson C. Chapman, who died December 1, 1896; Dana B. Chapman, who died November 22, 1865; Charles W. Chapman, who died March 10, 1884, and the sister, Mary E. Buckland, who died January 18, 1905.

At the death of the testator the two brothers, Dana B. Chapman and Charles W. Chapman, each had children living; and the two brothers and the sister who were living at the death of the testator each have left children living, or their representatives.

The testator's wife, Fannie E. Chapman, died leaving three sisters and one brother, and the children of one deceased brother, living at the time of her death. And at the death of the son in 1910, the living representatives of the testator were nephews and nieces or the children of nephews and nieces; and the living representatives of his wife, Fannie Chapman, were one brother and three sisters and the children of a deceased brother.

Four specific questions are propounded in the petition for answer by the court. The main question discussed in the argument was question No. 1. Upon question No. 2 there seems to be no disagreement among counsel. On question No. 3 there seems to have been no disagreement. I do not understand that

a question is now raised as to the fourth question propounded in the petition. The other questions have been raised by the answers and cross-petitions of the various defendants; and as to these, so far as the court finds necessary for determination, it will state its conclusions.

The first question raised for determination, and which was reserved at the time of the hearing, was the competency of the testimony of the witness H. C. Miller and his sisters, each of whom is a party, and all of whom filed no answers in the case.

It is apparent that, as claim is made by Wilberding, administrator *de bonis non* of Mrs. Fannie Chapman, and the Guardian Savings & Trust Company, as executor of Harry E. Chapman, to a large part of the assets in the hands of the trustees, the interest of Miller and his sisters, as individuals, and the different representatives of the life tenants, will be largely affected by the decision as to the distribution of the estate in the hands of these trustees; that the interests of these parties in the litigation are and would be adverse to each other under the provisions of Section 11495 of the General Code, if the suit was an action between them individually. It is also manifest that if the witness Miller had no interest individually, but only as trustee, he would not at least have any personal interest adverse to any of the parties.

The case is, therefore, an unusual one, so far as the competency of Miller is concerned. As trustee, he represents only the estate. Is it possible to limit the question of his competency to matters pertaining to the estate or should his testimony be used in the determination of all the questions arising on the pleadings?

The estate as represented by Miller, trustee, is not adverse to any of the parties. All of the assets are to be distributed to some one. The only question as to which Miller and his sisters and the representatives of life tenants are adverse arises out of the distribution of the estate. The trustee is in a position in the nature of a stakeholder asking to whom the fund shall be distributed. If the action was one brought by the representative of the life tenant against the trustees who had refused to



1912.]

Miller et al v. Miller et al.

pay money to the representatives, claimed to be due the deceased life tenants, then the trustee as well as the claimant would probably be adverse under the rule in *Farley v. Lisey*, 55 O. S., 627. But the action is not of that nature. The estate or trustees are not resisting payment to the representatives of the life tenants any more than they are resisting payment to the living brother and sister, but merely asking the advice of the court as to the proper disposition of the assets in their hands. This is the sole issue so far as the estate is concerned. It is true that the decision will affect the individual rights of Miller and his sisters, and the right of the representatives of the life tenants, and all will be bound by the judgment entered in the case; but it does not seem to me that, as representing the estate, Miller, trustee, has any interest in or is an adverse party as to any one; and that, representing the estate, he was required to put before the court all the facts, and then let the court determine how and to whom the distribution shall be made. For this purpose, he is not within the spirit of Section 11495. The purpose of the statute is to protect the interests of the decedent against an adverse interest, represented by a living party. Here, so far as the representatives of the decedent life tenants are concerned, they are not adverse to the trust estate, but claim under it; and such claim is not resisted by the estate, but by other parties to the action only. The adverse interests are between the distributees entirely. Do such adverse interests between distributees render them incompetent? It seems to me not. The testimony of each is given for the purpose of enlightening the court upon the real facts upon which the construction of the will is to depend; and while these defendants have adverse interests, the estate has but one interest, and that is that the distribution shall be made in accordance with the intention of the testator; and upon this issue none of the parties hereto are adverse; and it seems to me that, in respect to this issue, they are all competent. If not incompetent so far as the estate is concerned, then they are not adverse parties because adverse to each other as to the distribution to be made of the estate.

I therefore hold that all the witnesses are competent, in order that the estate may put before the court all the facts, whether

such facts are obtained from one source or another, and whether the sources are interested adversely or not.

The second question arises out of the fact that, for the last eight or ten years of the testator's life, he did not live in Ohio, and for at least the last seven years of his life he had roomed at the residence of Dr. McCollin in the city of Philadelphia, Pa. It is therefore claimed that the testator's legal domicile was not in Ohio, but in Pennsylvania; and that, while his will was probated in Cuyahoga county, Ohio, yet such probate was not an original probate, but ancillary to that of the testator's real domicile in Pennsylvania. That neither in fact nor in law was the testator's domicile in Ohio. That as a matter of fact, testator's domicile being Pennsylvania, this court should treat the probate in Cuyahoga county, Ohio, as ancillary; or, in determining the question of distribution, apply the law of the state of Pennsylvania as controlling and governing the distribution.

Two objections are made to this contention: First, that the will was in fact probated in Cuyahoga county as an original probate, and that the judgment of the court admitting the will to probate in Cuyahoga county can not be attacked in this proceeding. Second, that as a matter of fact the testator's domicile was not in Pennsylvania, but was in Cuyahoga county, Ohio.

The facts as to the testator's domicile are about as follows: He and his wife had lived in Cleveland until about the year 1882, on Willson avenue, owning their home there. This residence had been a long-continued one. In the year 1882 he had obtained employment with the B. & O. Railroad Company, and went to Baltimore, Md. At the time of departing to Baltimore he sold his home on Willson avenue, and some of his household furniture. The remaining articles of household furniture were stored for a time, and then shipped to him at Baltimore. At that place he and his wife were living at a hotel, and continued to do so as long as they resided in Baltimore. The furniture was not unpacked, but was afterwards reshipped to Cleveland, Ohio, and again stored here until the marriage of his son in 1887, when all but a small portion of it was given to his son. Some articles, perhaps, were taken by him to Philadelphia.

1912.]

Miller et al v. Miller et al.

In 1884, or about that time, he obtained employment with the Midvale Steel Company, and removed to Philadelphia, where he and his wife went to room at the house of Dr. McCollin. With the exception of a single year, when he and his wife were in California, he continued to live at the home of Dr. McCollin until his death in 1893. At the home of Dr. McCollin he had one room furnished by Dr. McCollin, except as to some small articles which were furnished by the testator. He and his wife boarded across the street from the residence of Dr. McCollin, and never had any other home or residence during the time that they were in Philadelphia.

I do not find that the evidence justifies holding that he ever voted in Philadelphia, although something is said about it in one of the depositions. He did frequently refer to Philadelphia as his home, both in correspondence to his wife and in a memorandum diary kept by him during all these years. All his personal property, in the nature of investments and bank accounts, was sent to H. C. Miller from time to time in Cleveland. Both he and his wife returned to Cleveland frequently to visit friends and relatives; and in talks with them he frequently stated that he purposed to return to Ohio as soon as he had made sufficient money to take care of himself and his wife; and there are some declarations which tend to show that he expected to return to Cleveland. During part of this time he became employed with the Latrobe Steel Works Company, and was one of its original organizers; and after its organization he traveled for that corporation. It had its office in Philadelphia. There are no declarations, so far as the evidence shows, tending to prove that the testator at any time stated that he intended making Philadelphia his permanent residence. On the contrary, the testimony tends to show that his removal from Cleveland was temporary, and that his intention was always to return to Cleveland or to Ohio as his permanent place of domicile.

In 1891 he returned to Cleveland for one of his various visits, and on the 29th day of May he made and executed the will herein in question. In this document he describes himself as "Nathan E. Chapman, of the city of Cleveland, county of Cuyahoga and state of Ohio"; and further, in the last paragraph of

the will, he provides that if the trustees should die or fail to administer the trust, the probate court should appoint a successor or successors to said trustees, as provided in Section 5986 of the Revised Statutes of Ohio.

After his death his wife made application for the probate of this instrument, and stated therein that the testator was "late of Cuyahoga county, Ohio," and she herself at the end of the application states her residence to be Cleveland, Ohio.

I have somewhat briefly referred to the evidence, not so much for the purpose of expressing opinion as to this question of fact as to show facts upon which the probate court acted or is presumed to have acted at the time of admitting this will to probate in Cuyahoga county, Ohio.

The testator undoubtedly resided in Philadelphia during nearly all the last eight years of his life; but it does not appear that such residence was made with the intention of making it a permanent abiding place. In order to become a domicile, there must have been a removal from the former place of domicile with the intention of making the new residence a permanent residence, and without an intention of returning to the former domicile.

From all the facts, some of which I have recited above, it can not be claimed that the proof conclusively shows that the testator's domicile was in Philadelphia, Pa. Therefore the question was an open one as to such domicile, whether in Pennsylvania or in Ohio. Unquestionably the Probate Court of Cuyahoga County had a right to determine that question upon proper application being made to it. By Section 10604 of the General Code, "upon the death of any inhabitant of this state, letters testamentary shall be granted by the probate court of the county of which he was an inhabitant or resident at the time he died." The application by Mrs. Chapman to probate his will in this county, in the form it was made to the probate court, therefore brought to the attention of the court for decision at that time the question of whether or not he was an inhabitant of the state of Ohio. The court passed on the facts; and we must presume that all the facts which this court now has before it, and any other facts that might be presented upon that question, were

1912.]

Miller et al v. Miller et al.

considered by the probate court when it admitted the will to probate. The statutes made provision for a contest of this question as to the domicile of the testator and the character of the probate (Section 10520, General Code). No such contest was made by any one. The court had jurisdiction to hear and determine, and it did hear and determine; and it granted the letters in this case as an original probate.

It seems to me, from the facts as they appear in the case, that the probate court might well have reached this conclusion. It is true that under Section 10604 and other sections of the code the court can admit a will to probate for other reasons than that the decedent is an inhabitant of Ohio; but the jurisdictional facts are then different, and the probate is founded upon an entirely different application and proof. Here the jurisdiction was based on the fact that the testator was an inhabitant of the county. No application was made for an ancillary probate, or for a probate of a foreign will. The court had ample opportunity to admit this will as the will of a deceased inhabitant; and that was the only form in which application was made to it at the time the will was probated; and we think that this can not now be questioned in a collateral action, first, because the question of admitting the will to probate as an original probate depended upon a disputed question of fact as to domicile, and that having been determined, such determination is final. *Scheuer v. Richmond*, 16 O. S., 455; *Boughton v. Schriver*, 18 L. R. A., 242; *Record v. Howard*, 58 Me., 225.

If this was an original probate, we are not concerned with what distribution might be required by the law of some other domicile. The question was not raised or decided in *Swearingen v. Norris*, 14 O. S., 424. It appears that it was admitted that the domicile of the decedent was in Pennsylvania, and our court held that the law of the place of domicile determined the devolution of personal property, no matter by what jurisdiction it is administered. What would have been the decision had the right to make original appointment of administrator been controverted, is not determined. In our case domicile is controverted, and the judgment of the probate court can not be attacked collaterally; therefore the distribution must be in accordance with the law of Ohio.

Without reciting the relationship between the heirs of the testator in particular, the next question that arises is as to how the distribution shall be made. As I have stated at the beginning of this opinion, the testator provided in his will that on the death of the son without living issue, "then \* \* \* it is my will that all my estate shall go one-half to my lawful heirs and one-half to the lawful heirs of my wife, subject to the following conditions:

"Should my son's wife survive both my son and my wife, then it is my will, that one-fourth of my said estate, shall still remain in trust, she to be paid by said trustees, the net income of said one-fourth, during the time that she remains the widow of my said son; and that the remaining three-fourths of my estate be then and there divided between my heirs and the heirs of my wife, as aforesaid; provided, however, that if my sister, Mary E. Buckland, should survive me, then it is my will that the share that she would receive at law should remain in trust, in the hands of my said trustees, she to receive the income therefrom during her lifetime, and at her death said share to be paid to and vest in her daughter and the heirs of her daughter, Maria. It is my will that no part of my estate shall ever go to my said sister's son, George. And provided, further, that the share that would go to Mary A. Solloway, sister of my wife, shall remain in trust during the lifetime of said Mary A. Solloway; she, during said time, to receive the net income from said share; and at her death, it is my will that said share should go to the other heirs of my said wife, excluding therefrom the children of the said Mary A. Solloway, it being my will that the said children of the said Mary A. Solloway shall inherit or receive no part of my estate. And provided, further, that the part of my estate which would go to Mitchell H. Miller, brother of my wife, shall be held in trust during the remainder of his lifetime, by said trustees, he to receive the net income therefrom, and at his decease, the same to go to his children. And it is my will, that in the event one-fourth of my estate shall remain in trust for the benefit of the wife of my said son, as above provided, then at her marriage or decease, as aforesaid, said one-fourth to be disposed of in the same manner provided above for said three-fourths."

By the provision that after the death of his son without living issue, "the estate shall go one-half to my lawful heirs and one-half to the lawful heirs of my wife," a contingent estate is



1912.]

Miller et al v. Miller et al.

given to such heirs. Whether it is a contingent remainder or an executory devise, it is perhaps not important to determine. It is clearly not a vested interest in the heirs. The gift to the lawful heirs is itself dependent on a contingency. There is no gift *in presenti*. The enjoyment not only is postponed, but the contingency attaches to the gift itself. There is an uncertainty as to the actual enjoyment, not an uncertainty merely as to the time of enjoyment. Upon this question there can be little doubt on the authorities (*Richey v. Johnson*, 30 O. S., at 294-5). The question then is, whether there is uncertainty also as to the persons who shall take when the gift actually comes into enjoyment. It is the contention of the children of William H. Chapman that the persons who are to take should be referred to the time that the estate vests; and all the other heirs of the testator contend that those who are to take shall be determined as to the time of the death of the testator.

It is conceded by all that the intention of the testator, as found in the will, must govern; and for this purpose the entire will must be construed together and effect given to all of its words and provisions. This is the accepted rule of interpretation everywhere. If there be doubt and ambiguity in the terms used by the testator, then resort may be had to rules of interpretation for the purpose of aiding or assisting in the determination of the testator's meaning (*Townsend v. Townsend*, 25 O. S., 477). The words used by the testator in this instance are not free from ambiguity. He first says the estate "then \* \* \* shall go one-half to my lawful heirs, subject to the following conditions." He then provides that in the event the son should leave a wife, one-fourth to be held in trust for her while she remains a widow, and the remaining three-fourths to be "then and there divided between my heirs and the heirs of my wife. Provided, however, that if my sister, Mary E. Buckland, should survive me, then it is my will that the share that she would receive at law should remain in trust, in the hands of the trustees, she to receive the income therefrom during her lifetime, and at her death said share to be paid to and vest in her daughter, Maria. \* \* \* And \* \* \* no part of my estate shall ever go to my said sister's son, George."

If there had been no conditions attached, but a gift merely to lawful heirs, then, under the rule prevailing in England and Massachusetts, heirs would be determined as of the date of the testator's death, even though there be intervening life estates; and this seems to be the general rule in many other states. This, of course, is giving the natural and normal interpretation to the word "heirs" as being those persons who take at the death of a decedent.

Where the gift to heirs is directed or implied by the words "distribute," or "divide," or "make a sale and divide," without other words of gift, the rule in Ohio seems to be that the persons who answer the description of heirs at the time of distribution are the ones who are to take, that being the time that the estate vests in enjoyment. Where the devise is to lawful heirs, it is presumed that the testator meant the persons who would take under the statute of descent and distribution in cases of intestacy, and resort must therefore be had to those statutes to determine who shall take. 79 O. S., 358; 70 O. S., 57.

If the gift were to the "lawful heirs," without the conditions which follow, it might well be said that the testator, having exhausted his specific wishes, desired the estate to follow the course provided by law. But the conditions which follow show that the testator was not satisfied merely to let the law take its course; but in event the contingency happens by which the estate goes to lawful heirs, he then gives express direction as to how the shares given certain named heirs, both of himself and his wife, shall be enjoyed by them, viz., to his sister, Mary E. Buckland, in trust; and at her death said share to be paid to her daughter, Maria, to the exclusion of the son, George; and the share of Mary A. Solloway, sister of his wife, to be held in trust, to pay her the net income during her life, and that no part of it should go to the children of Mary A. Solloway, but on her death should be divided among the other heirs of his wife; and the part of the estate which would go to Mitchell Miller, to be held in trust; at his death, the same to go to his children. His intention to rely upon the statute of intestacy to determine who shall take any of the portions is therefore qualified. While the devise is "one-half to my lawful heirs," which, without

1912.]

Miller et al v. Miller et al.

other words would give to each heir of equal degree a single share, yet the express desire of the testator is, that while his sister, Mary E. Buckland, shall take a single share, yet her son, George, should not have anything, but that Mary E. Buckland's share, if she did not survive the testator, should go to her daughter and the heirs of her daughter, Maria. The testator, therefore, seemed to have in mind that his brothers and sisters should take a share of the property. Then in the following clause he refers to the heirs of Mrs. Solloway, sister of his wife. He provides that her share shall go to the other heirs of his wife, and that her children should receive no part of the estate. And he further provides that the part of the estate which would go to Mitchell Miller shall be held in trust. The provision as to Mary E. Buckland, that "if she survive me," indicates that the testator had in mind this particular sister, and that she might not survive him, and he controlled the gift of her share. This would seem to make the gift to the daughter of Maria one of purchase, and not merely by representation. The same applies to the share of Mrs. Solloway.

It therefore appears that the testator has himself given a construction as to whom he had in mind under the term "lawful heirs"; and that is, brothers and sisters of both his wife and himself. It is true two of his brothers had long been dead, each leaving children alive; but the testator at his decease had two living brothers and one sister. His wife's brothers and sisters were all living at the testator's death. So it seems, taking the four corners of the will to ascertain his intention, that the words "lawful heirs," as used by the testator, were intended to describe his brothers and sisters and the brothers and sisters of his wife, unless there be found some reason contrary to or inconsistent with this interpretation. He has used the words "lawful heirs" to describe these brothers and sisters as a class whom he desired to take; and that they were the class he had in mind is clearly referred to in the later provisions; that he referred to the lawful heirs to ascertain who should take, and then proceeded to define how they shall take. This would seem to clearly indicate that he intended by the words "lawful heirs" the persons answering that description at his death. The words

"shall go to my lawful heirs" are dispositive; and while he provides that if his son leave a widow, such widow shall receive the income of one-fourth of the estate, and that the remaining three-fourths shall "be then and there divided," these are words of division; and if these latter words were the only ones directing or implying the gift, they might, under the rules in Ohio, refer the ascertainment of the persons answering that description to the date of the distribution, as in 79 O. S., 358; 19 O. S., 30; 38 O. S., 242. Yet these are not the words on which the gift depends, they being "shall go," the former words directing how the distribution shall be made among the class which the testator has already described as lawful heirs. He now particularly describes those among whom he controls the division, including some who might take by representation.

It is urged that the term "lawful heirs" is a technical term, and should be given a technical meaning, but this is not the rule in Ohio. In 33 O. S., 572, the widow was excluded, such being the testator's intention. In 38 O. S., 473, the widow was included in the term "heirs." In the former case the word "heirs" was held to include brothers and sisters, and exclude the widow. So in Ohio "heirs" has been held to mean any one who might take any estate, real or personal, on the death of the decedent, if the context of the will shows such intention.

Again, it is urged in our case that the widow and son were the testator's only heirs at his death; and if "lawful heirs" meant those who stood in that relation at the testator's death, only the son and wife would answer that description. This contention is also answered by *Jones v. Lloyd*, 33 O. S., 572, that if "heirs," as used by the testator, shows an intention to exclude the wife, then she is excluded and the word "heirs" is given its technical meaning. In our case, just as definite an intention, as I construe this will, is shown to exclude the son; and if I am correct in such interpretation, there is no rule by which he can not be excluded.

It is further urged that "lawful heirs" having reference to both his own and his wife's, must refer to a class of persons, and at a time when both himself and wife had heirs, and that time was the time of division. The son was the only heir of the

1912.]

Miller et al v. Miller et al.

widow, and it is just as manifest that in referring to her heirs he excluded the son, as when he referred to his own heirs. And while the coupling of his heirs and her heirs in a division to be made at the same time might indicate that both classes of heirs should be ascertained at the same time, yet this is not conclusive if the context indicates a different date for ascertaining who are heirs. 13 Simons, 613.

My conclusion, therefore, is, that this is not a case where the gift is only implied from the words "divide the proceeds after the death of the life tenant," like *Richie v. Johnson*, 30 O. S., 288; *Barr v. Denney*, 79 O. S., 358; but the gift here is direct, and the direction "then and there be divided" is only an incident of the division of the gift already decreed by the former clause.

It therefore appears that the testator's intention, as appears by the will in the words "lawful heirs," was to refer to his brothers and sisters and the brothers and sisters of his wife; and that the division should be made among them who were living at his or her death, respectively, *per stirpes*, and the representatives of the deceased brothers and sisters taking the share that would have gone to their deceased ancestor if living, except where the will directs such shares shall not go to the son of Mrs. Buckland and the children of Mrs. Solloway. *Allison v. Allison*, 101 Va., 537.

The next question for determination arises upon the stock held by the testator at his death in the Latrobe Steel Works.

The Latrobe Steel Works was a Pennsylvania corporation organized in 1888, with a paid-up capital stock of \$600,000. Of this stock the testator held 250 shares of the par value of \$25,000. In the balance sheet of September 30, 1892, some four or five months prior to the death of the testator, it appeared that it had increased its profit and loss account, from its organization to that date, \$187,000. In what form this amount of increase in the assets of the company was, does not appear. Prior to that date the company had paid no dividends. In 1895, as shown by its profit and loss account September 30, the company had in that account \$868,000; and if I am correct in my figures, its total assets at that time exceeded \$1,500,000. On or about

May 20 of that year, for some reason which does not appear in the testimony, the Latrobe Steel Works, by its board of directors and with the consent of all its stockholders, sold its entire assets, plant, machinery, gas leases, gas wells, pipe lines, and other assets, to the Latrobe Steel Company for \$1,200,000, to be paid in the capital stock of the latter company at the rate of two shares of the stock of the new company for one share of stock of the old company. All the stockholders consented to this sale, and each received the stock in that proportion. At the time of this sale the company had cash on hand amounting to about \$7,000. In what form the other assets of the company were, does not appear, but presumably it was in its physical assets and accounts, except the cash mentioned. After this sale the Latrobe Steel Works went out of business; and while it does not appear that the corporation itself was dissolved, no further evidence has been given as to just what became of the old organization.

At this time also it appears that \$300,000 of the capital stock of the Steel Company was used to purchase the capital stock of the Latrobe Steel & Coupler Company, a corporation organized under the laws of Illinois and doing business at Chicago. The Steel Company then engaged in business, and for the next ten years paid large dividends upon its capital stock. During the later years this dividend amounted to 20 per cent. per year.

In 1905 the Steel Company sold all its physical assets, plant and machinery to the Railway Steel Spring Company for \$4,300,000. Of its assets at that time, it reserved from sale its cash balance, accounts, the stock of the Coupler Company, and materials on hand. The cash balance at that time, as shown by its profit and loss account, was about \$2,126,219. There was some indebtedness, which, from the statement of its accounts, appears to have been about \$789,900, leaving a cash balance, after the payment of this, of about \$1,300,000. In what form the other assets were, does not appear.

In 1908 it sold the stock of the Coupler Company for \$1,243,000 cash to the National Malleable Castings Co. So that it received for its total assets \$8,549,250, after payment of debts and charges.



1912.]

Miller et al v. Miller et al.

During the month of January, 1906, it distributed to its stockholders \$6,000,000 in four distributions, each distribution made being equal to the face value of the stock held by each of its stockholders. Thereafter there was paid to each of its stockholders his proportional interest in the remaining assets; so that the trustees of the estate of Nathan E. Chapman received in all \$287,000.

The question arises as to the nature of the transaction in 1895 and the transaction in 1905. The claim is made that a large proportion of the 250 shares received by the trustees in 1895 was income, and belonged to the life tenants, and was not part of the capital of the trust fund; and further, that in the distribution of the assets of the corporation under the proceedings in 1905, a large part, at least, of the cash on hand was earnings of the corporate property, and belonged to the life tenants, and not to the corpus of the estate.

Some further facts I will state when I undertake to state the application of the law as I understand it to the facts as they have been presented by the evidence.

On these facts, what are the rights of the parties? And here I assume, for the purpose of this decision, that the representatives of the life tenants have a valid right to receive such portion of the fund in the hands of the trustees as should have been distributed to the life tenants during their lives as income under the terms and provisions of the will.

On the part of the representatives of the life tenants, it is claimed that of the 500 shares of stock of the company received by the trustees in place of the 250 shares of the capital stock of the steel works, the larger part of the added 250 shares belonged to the life tenant as income; that the transaction was a constructive stock dividend; and that, under the rule of division between life tenant and the remainderman, established by the courts of Pennsylvania, the proportional interest of the testator in the assets of the corporation at his death determined the principal of the trust fund, and that the balance above that is income. By this rule, where a dividend is declared by the corporation, the court will determine and apportion the respective interests of the life tenant and remainderman in the divi-

dend; and this is so whether the dividend is a cash dividend or a stock dividend (*Earp's Appeal*, 28 Pa. St., 368). This rule has been adopted by various jurisdictions, with some modifications, notably, New York, Kentucky, Maryland, Iowa, which refuse to apportion the dividends declared by the corporation after the death of the life tenant, but give all to the life tenant. This rule is denominated by several of the text-writers the American rule, distinguishing it from the Massachusetts rule, which holds that cash dividends belong to the life tenants and stock dividends to the remainderman (*Minot v. Paine*, 99 Mass., 101; 12 L. R. Appeal Cases, 385. This rule prevails in Connecticut, Maine and Rhode Island.

These rules both profess to follow the intention of the testator where he has devised and bequeathed the profits, dividends, income or interest on shares to a person for life, with remainder over on the death of the life tenant.

Perhaps not much quarrel can be had with either interpretation if one adopts the reason advanced by the respective courts for their rule. The Pennsylvania rule proceeds on the assumption that the testator's intention is to capitalize his stock interest in the assets of the corporation as of the date of his death, and to segregate that amount from all future increase, in the value of the assets of the corporation; and all increase after his death, when declared as dividend, either cash or stock, the testator intended should go to the life beneficiary. The other rule finds the intention of the testator to be to preserve not only the interest of the testator as of the time of death, but the increased value of the investment shall be preserved to the principal; and only the cash dividend as and when declared by the corporation from its earnings should be paid to the life tenant.

While this may not be the exact statement of the reason for either rule, both profess to be founded on the intention of the testator.

The decision, therefore, has depended, in jurisdictions where the question has not theretofore been decided, upon the attitude which the court adopted as to the intention of the testator.

Both of these rules, however, apply to dividends declared by the corporation out of the profits or earnings made by the cor-

1912.]

Miller et al v. Miller et al.

poration, whether in the form of a stock dividend or a cash dividend. All the courts agree that until a dividend has been declared, neither the life tenant nor the remainderman has any interest in the assets of the corporation which he can appropriate or control. The question can only arise when the corporation has acted; then the courts following the Pennsylvania rule will inquire whether it is a division of the earnings of the corporation, or whether a division of the corpus of the assets. If of the earnings, then those accruing after the death of the testator belong to the life tenant, and those accruing before are part of the corpus and belong to the remainderman. *Vinton's Appeal*, 99 Pa., 434.

The Massachusetts rule seems to reach the same point. If a dividend, cash or stock, be in fact a division of the corpus of the assets of the corporation, it will remain part of the principal of the trust fund.

A corporation may use its earnings and increase as the directors deem for the best interests of the company. It may use such increase, whether from earnings or other sources, in the enlargement of its plant or business to any extent the directors deem proper. It may be dealt with as capital or as profits. It may distribute its earnings among its stockholders, or, acting in good faith, it may appropriate them to the permanent uses of its business. With such discretion, no stockholder can interfere (*Gibbons v. Mahan*, 132 U. S., 549). The difficulty comes in determining whether the corporation has appropriated its earnings to capital, or whether it has treated it as surplus earnings and preserved its character as such. If the corporation has preserved the character of its earnings and profits, and then declares a dividend therefrom, either in the form of cash or of stock, then the American rule gives the dividend to the life tenant, and the Massachusetts rule determines arbitrarily according as the dividend is stock or cash.

This, I understand, represents the real difference between the rules. The form in which the corporation has treated its earnings on the books of the company does not necessarily conclude the determination. It might appear on the books as surplus, profits, contingent fund, or otherwise. If it is maintained and

preserved as a surplus or profit account, even though it may have been devoted to some of the purposes of the corporation, and a dividend declared, it is still earnings and income; but if it has been devoted to the permanent uses of the corporate business, it then belongs to the corpus of the estate, and on the division will belong to the principal of the trust fund. The question is, has the identity and character of the earnings been so preserved that the board of directors may appropriate part of it, or all, for the purposes of dividends? If the corporation has unmistakably appropriated its earnings to the permanent increase of its plant and business, notwithstanding the form in which it is carried on the books of the company, it becomes principal; and if then the corporation divides it, it is a division of principal, whether cash or stock. This seems to follow if it be granted that the corporation has the right to devote its earnings to increase of its plant and business. The Pennsylvania rule, or at least the Pennsylvania decisions, may perhaps capitalize the holding of the trust estate as of the date of the testator's death, and hold all increase—no matter whether held as a surplus fund or devoted to the permanent enlargement of the plant and business—to be profits or income; but this rule does not seem to obtain, so far as I can find, outside of Pennsylvania (79 Ct., 634). All the other states seem to recognize the right of the corporation to devote its earnings to the increase of its assets and the permanent enhancement of its capital, and thus to make earnings capital (*Hemenway v. Hemenway*, 181 Mass., 406; 79 Md., 545, at 556). Such permanent investment by a corporation in its business goes to enhance the value of the corpus of the assets; and, if divided, is a division of the corpus and belongs to the remainderman (*Kalbach v. Clark*, 133 Ia., 215). Any other rule arbitrarily prohibits any increased or enhanced value of the investment of the trust fund. Such an interpretation seems to be clearly contrary to the intention of the testator. The Pennsylvania rule itself seems to recognize that there may be increased value of the investment after the date of the testator's death, when it holds that the option to purchase new stock is an inherent right of the old stock, and goes to the remainderman. *Moss's Appeal*, 83 Pa. St., 264; 93 Ky., 257.

1912.]

Miller et al v. Miller et al.

The will in our case gave the trustees power to sell the securities and reinvest the proceeds. This seemed to contemplate that there might be an advantage to the estate to sell the securities, and that there might be an increase in the investment side of it; and from which larger income might be earned for the life tenants. The will provided that only the net income was to be paid to the life tenants. To follow the Pennsylvania rule, as I understand it, would prevent the increase in the testator's investment after his death; that as between the life tenants and the remainderman, notwithstanding the fact that the corporation has devoted its earnings and profits to the permanent uses of the company's business, the increase, on any division, would go to the life tenant. It seems to me the authorities, outside of Pennsylvania at least, do not sustain this position, but recognize the fact that the corporation may devote its earnings to increasing its plant and business; and when it does so, the action of the company is conclusive, and it becomes a permanent appropriation of its assets, whether from earnings or otherwise, to the capital of the corporation. On the other hand, the rule that if a corporation preserves the character of all or part of its earnings separate from its assets permanently devoted to the uses of the company, the right to the dividend will depend upon whether it is one from such a fund or whether from a fund created by the sale and distribution of the corporation's capital, seems to be correct. *Heard v. Eldridge*, 109 Mass., 258.

In *D'Ooge v. Leeds*, 176 Mass., 538, at 563, the Adams Express Company case, the court say:

"The question is, what part of the property is held in the business as a fund to be used for the benefit of the business, and what part is permanently separated from the business and turned over to the individual proprietors as income to be spent?"

In *Hemenway v. Hemenway*, 181 Mass., 406, at 409, *supra*, where the corporation had reserved from a sale of its plant and business "treasury assets," and declared a dividend out of said assets, the preliminary vote of the directors having declared such assets to represent the "accumulated undivided profits," it was held that such dividend was income. It was contended

for the remainderman that this was merely a method of making a sale of the entire assets of the company, and that the reserve treasury assets were merely a part of the consideration received. The court say, page 409:

“We have assumed that if the real transaction was as contended, and if the dividend was made and paid as part of the consideration for the transfer of stock, the contention that it was principal, and not income, would be sound.”

In *Second Church v. Colgrove*, 74 Ct., 79, where the company had set aside from the proceeds of the operation of its mines a sum exceeding its capital stock, and by concerted action of the directors and stockholders sold its stock and reserved such cash assets; *Held*: that the proceeding was substantially a liquidation, and that the dividend of such assets was capital. The purpose for which the reserve fund had been accumulated was, to purchase other mines after those worked had become exhausted. The corporation had accumulated the funds from its operations, which it still held for the purpose of its business; and prior to the sale such assets had been reserved for the permanent uses of the company. On the selling out of the stock holdings, the fund was still part of the corpus of the assets, and belonged to the principal of the trust.

In *Bulkley v. Society*, 78 Ct., 526, the corporation, with the consent of its stockholders, voted to discontinue its business, sell its plant and assets, except cash and bills receivable, to another company, in return for shares of the latter's stock. All the reserved assets were sold, and the proceeds paid to its stockholders. *Held*: this dividend or division belonged to the corpus of the investment. The claim was made by the life tenant, that the reserve assets represented surplus earnings, the proportional share of which belonged to him. The court say:

“These dividends were not passed by the directors of the corporation in the exercise of their discretionary powers in determining what of the corporate assets representing surplus should be separated and withdrawn from that body of them, to be retained for future corporate use, and, thus separated, go out to share owners as income free from all claim of the corporation thereon. There was no purpose on the part of the directors to

1912.]

Miller et al v. Miller et al.

make a division of profits, as such, among the owners of shares which were to continue to exist. The company was engaged in liquidating its business and distributing all its assets to its stockholders. The end sought was the return to the owners of stock of all that the company owned, and its distribution to them in exchange or substitution for the shares which thereafter were to cease to exist. The directors were called upon to exercise no discretion. They had but a single duty, and that was to distribute everything in their hands, and they performed that duty as to cash and stocks in like manner. The company had ceased its operations as a going concern. The period within which dividends in the ordinary sense are made had passed. Its acts were only the necessary perfunctory ones attending dissolution. To quote the language of the Supreme Court of Massachusetts upon the subject of this very rule, as reported in the recent case of *Brownell v. Anthony*, 189 Mass., 442, 445: 'This language was used of corporations continuing in existence, and retaining their capital for the purpose of exercising their corporate powers. Obviously it has no application to dividends of the assets, made in liquidation of a corporation which has been or is to be dissolved.'"

In *In re Rogers*, 161 N. Y., 108, where a corporation sold its plant and raw materials to a new corporation, and received a large consideration to be paid in shares of the stock of the new company, and divided the shares among the stockholders of the old company in proportion of ten to one, the court held that these new shares were part of the capital of the trust fund, and not income. The whole amount received as the consideration for the sale was treated as capital. The court also held, that, of the reserved assets, one hundred dollars per share, the par value of the old shares, should be held in the trust fund as part of the corpus of the estate, and the balance of the reserved assets was profits and went to the life tenant.

The reason for treating the part given to the life tenant as income appears to be, that the company had invested a large part of the reserved assets outside of its own business, and was not using it for any purposes of the business of the company. But the court intimates that if it had been found to be working capital, it would have followed the corpus of the assets on a liquidation sale.



In *In re Stevens*, 98 N. Y. Supp., 28, affirmed 187 N. Y., 471, on the sale by a corporation of its entire plant and business, regardless of the nature of the assets, and their sources, the court held that the proceeds of the sale, in the absence of a showing to the contrary, were capital and not income, following the *Rogers* case, 161 N. Y., 108.

How, then, stands our case in the light of these authorities? In September, 1892, four months prior to the testator's death, the assets of the steel works company had increased, as shown by the profit and loss account, \$187,000 above the par value of its capital stock. In 1895, at the time of the sale to the Latrobe Steel Company, as shown by its profit and loss account, the company had assets of \$868,000 in addition to the par value of its capital stock, while the testimony of Mr. Smythe, the president of both the steel works and of the steel company, shows that this increase was from earnings; the balance sheet in 1895 shows that its cash on hand was about \$6,900 at that time. Its real estate, machinery, tools, etc., amounted to \$802,000. Just in what form the remainder of the assets was, does not appear. It, however, does appear that the corporation had at that time gas leases, gas wells, and a pipe line. The sale to the steel company of its assets was made with the assent of the stockholders. No separate schedule of the assets seems to have been made. They were of sufficient value to cover a stock issue of \$1,200,000; and this stock, received as consideration, was issued to the stockholders of the old company in the proportion of two shares to one. Thereafter the old company did no business. For all that appears, all the assets sold by the old company to the new constituted its entire plant, machinery, real estate, working capital, and whatever assets it had used in carrying on its business. No dividend of any kind was declared. There was no division of earnings by the directors. It was a sale by the old company, with the consent of its stockholders, of the entire assets; and the proceeds of the sale, that is, the shares of stock of the new company received as consideration, were distributed to the stockholders of the old company. The transaction in 1895, therefore, seems entirely parallel with the facts in the *Rogers* case, 161 N. Y., 108, *supra*, so far as the distribution of the stock was con-



1912.]

Miller et al v. Miller et al.

cerned. There were at this time no assets reserved from sale, and no money dividends, just as in the Rogers case.

How stands, then, the transaction in 1905? In that year the steel company sold its plant and works to the Railway Steel Spring Company for \$4,300,000 cash. It reserved from the sale its cash balance, amounting to \$2,126,219, its accounts and materials, and its holdings in the stock of the Coupler Company, of the par value of \$300,000. There appears to have been some indebtedness at that time, which, as shown by the account attached to the deposition, ultimately amounted to \$789,900. If this be deducted from the cash balance, it leaves about \$1,300,000, which would have been the true cash balance. The corporation continued to hold the coupler stock until 1908, when it sold that stock for \$1,243,000 cash. After 1905 the corporation did no business, except collect its accounts, settle its business, and make its sale of the coupler stock. The total proceeds of all its assets amounted to \$8,549,250; and this amount was distributed in cash to its stockholders in proportion to their holdings.

In January, 1906, it distributed \$6,000,000. This distribution was made up of its cash balance and the cash received from the sale of its plant to the Railway Steel Spring Company. The trustees of Nathan E. Chapman received during this month \$200,000, in four payments of \$50,000 each; and at later times, as the accounts were collected and the stock sold, they received \$87,000 in addition. The difference between the value of the assets of the Steel Company between 1895 and 1905, Mr. Smythe, the president of the company, states was represented by the earnings of the company between those dates. No facts are given on which the witness bases this statement. It is, however, certain that payments made to the stockholders were not declared by the board of directors as being a dividend of surplus or earnings. The money received from the sale of the plant and the cash on hand was paid out to stockholders without regard to its sources. All was treated by the Steel Company as a single fund, and distributed to the stockholders as a part of the assets of the corporation, and the checks were marked "on account of liquidation." Perhaps these words were not conclusive as to the facts of the transaction, but they were substan-

tially in accord with the facts. The company had sold the principal part of its assets and all of its physical assets, and no longer was engaged in any other business than the settling up and collection of its accounts outstanding, and the sale of the Coupler Company stock. This was substantially a liquidation in fact, whatever name we may give to it.

From the evidence it appears that all the cash balance on hand at the date of the sale to the Railway Steel Spring Company may have been used, and probably was used, as the working capital of the company. No part of its assets was invested or used in any other than the corporation's own business. It does not appear that any part of this cash had been wrongfully withheld from the stockholders. Dividends had been paid as high as 20 per cent. a year for some years previous to 1905. Neither does it appear but that all the cash balance and the increase in its assets had arisen from the natural growth of the business and such improvements and betterments as a business of such magnitude would normally acquire. Undoubtedly some part, if not the whole increase, arose from earnings; but the evidence tends to show that up to the sale in 1905, these earnings had been devoted by the directors to the permanent enhancement of the value of its plant, and used in the business and, consequently, had not been held and segregated in such form as that it can be said that they were held for the purpose of distribution as part of its earnings to stockholders. The final distribution was made, not as such earnings, but as the proceeds of the sale of its entire assets and working capital; and, under the authorities, on such a distribution, the payments belong to the trust fund, and are not income. *Bulkley v. Society, supra.*

The entire amount received by the trustees from the sale should be distributed, in accordance with the terms of the will, as part of the trust-estate.

Another question was alluded to in argument on behalf of the representatives of Fannie E. Chapman, to-wit, that no allowance was made to her from the estate of her deceased husband for a year's support.

No evidence has been introduced upon this question, and it appears that the estate of Nathan E. Chapman is still open;

1912.]

Bank v. Iron Company.

and if her representative is now entitled to any such allowance, it can be made by the probate court on proper application and showing.

Holding the views just expressed, it is not necessary to decide whether the probate court had jurisdiction to appoint an administrator *de bonis non* of the estate of Fannie E. Chapman after the estate had been closed and settled and final account approved.

#### DETERMINATION AS TO OWNERSHIP OF FIXTURES INSTALLED BY A LESSEE.

Common Pleas Court of Hamilton County.

THE MARKET NATIONAL BANK v. THE JOS. GOLDBERGER IRON CO.\*.

Decided, February 19, 1912.

*Fixtures—Railway Tracks and Track Scales Placed upon Leased Property are Personalty, When—Public Policy, Having in View the Encouragement of Trade, Tending to Relax the Old Rule as to Fixtures—Competency of Evidence Relating to an Oral Agreement—Landlord and Tenant.*

1. Spur railway tracks and a track scale, so as to be removable with comparative ease from the freehold, are trade fixtures which may be removed by the lessee installing them there, or by the receiver of said lessee, where the lease contains no provision with reference to such fixtures and no provision that such installations shall become a part of the realty, and a privilege of purchase was given the lessee.
2. In determining the question of whether, in providing facilities for carrying on business on leased property, the intent was that they should be regarded as trade fixtures or otherwise, testimony as to an oral agreement between the landlord and an officer of the lessee

\* The circuit court on June 1, 1912, affirmed the judgment in this case in the following memorandum opinion:

"The court is of the opinion that the motion to dismiss the appeal herein is well taken and the same will be sustained.

"In addition, we have examined the evidence and are satisfied that the scales in question are trade fixtures and are properly in the hands of the receiver for sale as personal property."

company that such fixtures were to be regarded as a part of the realty is inadmissible, in the absence of any rule of the company or action by the board of directors which authorized such an agreement, or of any such provision in the written lease.

*A. B. Benedict and Pogue & Pogue*, for the receiver.

*Skiles, Green & Skiles* and *Louis B. Sawyer*, for G. M. Skiles.

GORMAN, J.

A receiver for the defendant company was appointed some time ago by this court who took possession of all the assets of the defendant company and proceeded to convert them into money, pay the creditors and settle up the business of the company. Included in the inventory of the assets filed by the receiver is one railroad track scale and tracks, which railroad track scale and tracks are on the premises belonging to G. M. Skiles, and under lease with the privilege of purchase by the defendant company. The receiver was about to sell this scale and the tracks, and G. M. Skiles, the owner of the premises under lease to the defendant company, has now interposed a motion to require the receiver herein to eliminate from sale under the order of the court heretofore made, the said scale and the said tracks.

The evidence heard upon the motion discloses that the scale and tracks were placed upon the premises of Mr. Skiles by the defendant company. The defendant company held a lease upon these premises, which are known as the old Front street pumping station in this city, from G. M. Skiles, dated December 29, 1909, for a term of one year ending January 1, 1910, with the privilege of a renewal of said lease for the further period of one year from the first day of January, 1911, and to be fully completed and ended on the 31st day of December, 1911. During the period of the lease and the renewal thereof, the defendant company had the privilege of purchase for \$60,000, during the first year of the lease and for \$65,000 during the renewal period of one year. The lessee agreed to surrender the premises on the termination of the lease in as good condition as they were in when the lease was entered into, reasonable wear and tear and unavoidable casualties excepted.

1912.]

Bank v. Iron Company.

After the lease was executed and the defendant company entered into possession, the defendant company constructed a side track from the Pennsylvania Railroad tracks lying along the side of the property into the premises, and also constructed railroad track scales of very large dimensions, upon which cars and their contents could be weighed. The tracks were laid upon ties on top of the ground and the scales were placed upon a solid concrete and steel foundation sunk into the earth several feet, and rested upon iron chairs which were imbedded in the concrete as the foundation to support the scales. An excavation was made in the floor of the premises several feet deep and the bottom of this excavation was filled with concrete and railroad rails; on the corners and at other places, iron chairs were imbedded and upon these chairs these scales proper were placed and rested thereon. The scales themselves consisted of iron beams with a wooden platform on top, and on top of this wooden floor, railroad tracks connected with the tracks leading into the premises. The scale beams and other parts thereof were connected together.

The evidence shows that the track and ties upon the premises can be removed without any material injury to the real estate and the scales can be removed by unbolting and lifting the same off the chairs and taking out the beams and the weighing arm. The removal of the scale would leave an excavation in the floor of the premises four or five feet deep and seven or eight feet wide, and perhaps twenty feet long. These tracks and scale, as said before, were placed upon the premises by the defendant company at its own cost and expense after taking possession of the property under the lease. Evidence was offered on the hearing and admitted over the objection of counsel for receiver, tending to show that Joseph Goldberger, president of the defendant company, had a conversation with Louis B. Sawyer, trustee and representative of Mr. Skiles, the owner of the property, wherein Goldberger agreed that if permitted to lay the tracks and install scales upon the premises and the company refused to exercise the privilege of purchase under the lease, these tracks and the scale were to remain as a part of the realty.

In laying the tracks and putting in the scale, it was necessary to cut through the stone and brick wall on the east side of the building making an apperture twelve or fifteen feet high and twelve or fifteen feet wide.

There is nothing in the lease providing for the laying of these tracks and the installation of the scale; nor is there any provision therein for these things remaining a part of the realty. In the absence of any agreement concerning the installation of these matters, it is a question of intent whether or not they become fixtures or trade fixtures. The evidence shows that those tracks and scale are carried on the books of the defendant company as assets. The evidence further discloses that these tracks and scale were necessary for the successful prosecution of the business engaged in by the defendant company, to-wit, the purchasing of and dealing in scrap iron of all kinds. Purchases of car load lots of scrap iron were made, shunted into the premises, weighed upon the scale and then unloaded, and other materials taken out in car-load lots.

I am of the opinion, in view of the fact that they were necessary to be used in the defendant's business, the absence of any agreement with reference to them in the lease and all the other attendant circumstances, that they are to be considered as trade fixtures. This opinion, I think, is sustained by the following authorities: 9 N.P.(N.S.), 218, a very able and exhaustive opinion by Judge Hoffheimer, of the Superior Court; *Wagner v. C. & T. R. R. Co.*, 22 O. S., 563, which was a case of a railroad company having the right-of-way over land and it was permitted to remove its tracks, bridges and abutments on the premises; *Fortman v. Goepper*, 14 O. S., 588; *Brennan v. Whittaker*, 15 O. S., 446; *Case F. M. G. Co. v. Garvin*, 45 O. S., 289; *Hyman v. Gordon*, 21 Bull., 179; 10 C. C., 119; 21 C. C., 284; and a very strong case, *Northern Central R. R. Co. v. Canton Co.*, 30 Md., 347, in which the syllabus reads in part as follows:

Syl. "Trade fixtures and buildings for trade, no matter how strongly attached to the soil or firmly imbedded in it, are treated as personal property and, as such, subject to removal by the person erecting them.

1912.]

Bank v. Iron Company.

“The road-bed of a railway, the rails fastened to it, and the buildings at the depots are real property; but under certain circumstances they may be trade fixtures and treated as personal property.”

The tendency of modern times and more recent decisions, is to permit the tenant to remove all improvements which he has made upon the premises that can be removed at all without material injury to the real estate, however firmly they may be fixed in the soil or however substantial they may be. The reason for this departure from the old doctrine of fixtures is that it has a tendency to encourage trade and is in harmony with the rule of public policy.

Did the agreement made between the owner of the premises and Goldberger, president of the defendant company, give these things the character of fixtures and make them a part of the realty?

While the court admitted the evidence of Mr. Sawyer and Mr. Wolfe as to the conversation between Joseph Goldberger and Mr. Sawyer, representing Mr. Skiles, with reference to the placing of the tracks and scale, I am of the opinion that Joseph Goldberger had no authority to enter into such an agreement. He was the president and general manager of the defendant company, and neither the rules and the regulations nor any actions of the board of directors gave him any power or authority to make any contract or agreement which would impress upon this personal property the character of real estate. The board of directors of the defendant company is the proper body to authorize the execution of such an agreement. See Bradford Belting Company case, 68 O. S., —.

Furthermore this agreement, which would have the effect of making personal property part of the realty, is one that must be in writing, under the statute of frauds, and there was no written agreement produced with reference to this matter; therefore, parol evidence was inadmissible to establish the agreement. [Furthermore, the lease between Skiles and the defendant company represents the agreement of the parties with reference to this real estate, and oral evidence which would

have the effect of including in the lease, property which was not included in the written lease, to-wit, the railroad tracks and the scale, is not admissible for the purpose of varying the terms of the written lease. See Section 234, *Browne on the Statute of Frauds*; 22 O. S., 563; *Elwell on Fixtures*, 2d Ed., Ch. 9, p. 513; *Stone v. Thaden*, 10 N. Y. Sup., 236; *Jarvis v. Jarvis*, 1 Manson's Bankr. Case, 199-201; *Mechelen v. Wallace*, 7 Ad. & E., 49; *McLaughlin v. Johnson*, 46 Ill., 163; *Ripley v. Page*, 12 Vt., 353.

Where the agreement is to the effect that things which would be otherwise fixtures, should be removed from the premises and considered personalty, the rule as to oral testimony is just the reverse of that stated, because this is not an agreement that refers to land. See *Long v. White*, 42 O. S., 59.

Considering the case, therefore, with the evidence of Mr. Sawyer and Mr. Wolfe eliminated, I am of the opinion that these tracks and scale are to be treated as trade fixtures or personal property, and that the receiver should be permitted to sell the same and realize thereon for the benefit of the creditors of the defendant company.

The motion will therefore be overruled.



1912.]

Lepps v. Bryson.

**AS TO VALIDITY OF AN EXCHANGE OF PROPERTY  
WITH AN AGED MAN.**

Common Pleas Court of Franklin County.

LEWIS C. LEPPS, ADMINISTRATOR, v. CHARLES W. BRYSON ET AL.

Decided, 1912.

*Adequacy of Consideration—Allegations as to False Representations,  
Duress and Senility—Right of an Administrator to Recover from  
One Who Dealt with His Intestate upon an Unfair Basis of Value.*

1. Where a man eighty-three years of age, having a wife and young children, desired on account of his infirm condition to give up his farm, which had a value of about \$8,000, and was persuaded to exchange it for city property, which could be occupied by himself and family and some income derived from the renting of rooms, the fact that in the exchange he received a consideration of perhaps \$2,000 less than he gave, does not constitute such gross inadequacy as would warrant a court in giving judgment for the difference in an action brought therefor by his administrator.
2. Mere inadequacy, or inequality in value between the subject-matter and the price, does not furnish basis for remedial effect, in the absence of inequitable incidents, or when the circumstances do not show the same to be so gross as to constitute fraud.
3. Where a transaction is claimed to have been induced by undue influence for an inadequate consideration, the remedy is equitable rescission. Failure to rescind promptly does not entitle one to maintain an action for damages for undue influence in the transaction.

*D. T. Ramsey and J. V. Lee, for plaintiff.*

*T. H. Clark, contra.*

KINKEAD, J.

The question is whether or not the plaintiff has established by proof sufficient facts to constitute a cause of action, and whether a verdict should be directed in favor of the defendants.

The petition alleges:

“On or about the fifth day of August, 1908, said William F. Reed being the owner of seventy-three acres of land situated in

Perry township \* \* \* the defendants induced and procured the said William F. Reed and Clara B. Reed, his wife, to sign an agreement in writing with them to sell and convey said lands to them by a deed of general warranty; in consideration whereof the defendants agreed to pay said Reed the sum of \$1,500, and to convey to him the premises located on Frambes avenue in the city of Columbus. \* \* \* Defendants paid said Reed the sum of \$50 when said agreement was signed.

"On or about the 15th day of October, 1908, the defendants procured from said Reed a deed of conveyance for said lands which were free and clear of incumbrances, his wife joining therein. And the defendants at the same time paid to said Reed the sum of \$1,450 and conveyed to him the said premises known as 56 Frambes avenue in the said city of Columbus.

"At the date of said agreement and of said deed the said lands of said Reed were of the value of \$8,000, and the said Frambes avenue property was of the value of \$3,500 and no more. Said agreement and said deed was procured by fraud of defendants in this, that at the dates of said instruments the said William F. Reed was eighty-three years old and infirm in body and weak in mind, and had long been and then was of weak mind, incapable of doing or attending to business, and not competent to make an agreement for the sale of his property or to execute a deed of conveyance therefor. All of which facts were well known to the defendants at the time of the signing of said agreement and of said deed.

"And at and before the date of the signing of said agreement the defendants falsely and fraudulently represented to said William F. Reed that said Frambes avenue property was worth \$6,000, knowing that the same was not worth more than \$3,500, and said statement was made with intent to deceive and defraud said Reed. Said Reed was wholly ignorant of the value of said property, and believed and relied upon said representations and was thereby induced to sign said agreement.

"After the signing of said agreement and before the execution of the deed, Frank P. Reed a son of said William F. Reed, informed the defendants that his father was eighty-three years of age, weak in body and mind, and almost blind, that he was wholly incapable of any dealings involving his property, and ignorant of the value of defendants' said property, and that his father's said lands were worth about \$8,000, and that the Frambes avenue property was worth less than \$4,000; that the consideration to be paid by defendants was grossly inadequate and that the sale would be a fraud upon said William F. Reed, and warned them against procuring or taking a deed from him.

1912.]

Lepps v. Bryson.

“After signing said agreement said William F. Reed, having learned that the said representations of defendants as to the value of their said property were false, refused to sign said deed; whereupon the defendants threatened that he would be adjudged insane and taken to the asylum for the insane, if he would not execute the same, by reason whereof and through fear and apprehension thereof, and by reason of mental weakness said Reed executed the said deed.

“Said lands were sold and conveyed by the defendants on or about February 27th, to the name of said William F. Reed of \$3,000,” for which judgment was asked.

This court, on general demurrer to the petition, ruled that it did not contain facts sufficient to constitute a cause of action. This ruling was based upon the theory that it having been stated in the petition that the alleged false representations which induced the making of the contract had been discovered to be false, and being, therefore, known to Reed, that he could not claim anything on account of such falsity because he had gone ahead and executed the deed of conveyance with knowledge of such falsity.

This court also ruled that the allegations of duress and mental incapacity were inconsistent with the allegations of fraud; in other words, that there had been a duplicate statement of a single cause of action, which was ground for demurrer, and that the facts stated were not sufficient to constitute a cause of action. The demurrer was accordingly sustained and the action dismissed.

The case was taken to the circuit court and reversed. In the opinion of the circuit court it was stated:

“It may be conceded that the false representations in reference to the value of properties are not sufficient foundation to support a cause of action, because of the admission that Reed, the decedent, had full knowledge of their falsity before executing the deed. And, it may also be conceded that the threats set forth in the petition are not of themselves sufficient to constitute duress where mental unsoundness does not appear.

“In the case at bar there is a distinct and unequivocal averment of want of mental capacity to make the contract, and that the defendant had full knowledge thereof, and also that the execution of the deed was induced through fear of the threats and by reason of mental weakness. The averments, in our opinion,

as to mental weakness lay a sufficient foundation for impeaching the transaction.

“It is urged that there was no offer to restore on the part of plaintiff, and that this is a pre-requisite. It must be noted, however, that the defendant has conveyed away the real estate received by him, and therefore, the action on the part of plaintiff must be for money instead of the property. *Doney v. Clark*, 55 O. S., 294.

“The conveyance away of the property by the defendant obviates the necessity for an offer to restore on the part of the plaintiff, of the property the defendant received. Such offer would be a useless formality and one which the law does not require. The defendants having placed the property received by them out of their hands, it is competent for the plaintiff to bring an action for the difference in value.

“We are of the opinion that the cause of action here does not abate, but is capable of revivor under Section 4975.”

In the trial of this case the plaintiff first disclaimed any intention of relying upon fraud. There was also a disclaimer of any intention to rely upon the threats or duress, as alleged in the petition.

Thereafter, plaintiff offered evidence to prove the alleged falsity of the representations claimed to have been made by defendants as to the value of the Frambes avenue property. The court sustained an objection to the introduction of such evidence on the ground, as stated in the circuit court opinion, that full knowledge of the falsity which the deceased Reed had would not be sufficient to warrant the action proceeding upon that theory. The mental attitude of the deceased Reed with reference to the alleged falsity of these representations must be considered either with reference to his being of sufficient mental capacity to act with reference to them, or as to his want of mental capacity by reason of his old age.

If he had sufficient mental capacity to comprehend and understand the transaction, he must be held to have not relied upon such representations, and hence, there could be no recovery on account of such alleged fraud. The ruling of the court was that the fraud could be shown, but that the action must proceed upon the theory that the conveyance was obtained by the defendants from the deceased Reed through threats and duress accompanied by mental incapacity. But having waived any claim with refer-

1912.]

Lepps v. Bryson.

ence to the threats, there remained nothing in the action but the elements of alleged mental incapacity by reason of old age, and the adequacy or inadequacy of the consideration moving from the defendants to the deceased Reed in the sale and transfer of the property.

While the circuit court stated in its opinion that the action did not abate, but is capable of revivor under Section 4975, I think it a serious question whether or not an administrator has the right to maintain the action as it now stands with the elements of fraud and duress eliminated.

Under Section 11235:

“In addition to the causes which survive at common law, causes of action for mesne profits or injuries to the person or property, or for deceit or fraud, also shall survive; and the action may be brought notwithstanding the death of the person entitled or liable thereto.”

What there is left in this action can not be considered as an injury to property. The administrator can have the right to maintain this action under this section only upon the theory that the transfer of this property by the deceased Reed to the defendants was made on the theory that he was mentally incapable of appreciating the nature and extent of the transaction, and that it was obtained from him by the defendant for a grossly inadequate consideration moving from them to him.

If there was any fraud in this transaction it would be by reason of the senility of the decedent and of the taking advantage of his condition and obtaining the transfer and sale of the property for a grossly inadequate consideration.

If there is any fraud in this transaction by reason of the facts just mentioned, it is to be considered as constructive fraud. Cases for relief on account of constructive fraud appeal to the jurisdiction of courts of equity, whereas actual fraud may give rise to an action by an administrator of a decedent against whom the same is practiced for the recovery of damages, and under the section of the code above quoted the same will survive. But it may well be doubted whether or not the administrator can maintain the action in this case for the recovery of damages, as in tort, on account of the alleged senility of the grantor and the inadequacy of the consideration moving to him.

It is stated by Pomeroy, Section 926, that:

“The rule is well settled that where the parties were both in a situation to form an independent judgment concerning the transaction, and acted knowingly and intentionally, mere inadequacy in the price or in the subject-matter, unaccompanied by other inequitable incidents, is never of itself a sufficient ground for cancelling an executed or executory contract. If the parties, being in the situation and having the ability to do so, have exercised their own independent judgment as to the value of the subject-matter, courts of equity should not and will not interfere with such valuation. \* \* \* The doctrine \* \* \* is now well settled, that *mere* inadequacy—that is, inequality in value between the subject-matter and the price—is not a ground for refusing the remedy of specific performance; in order to be a defense, the inadequacy must either be accompanied by other inequitable incidents, or must be so gross as to show fraud.” Section 926, Pomeroy Equity.

And again at Section 927, the same author says:

“Although the actual cases in which a contract or conveyance has been canceled on account of gross inadequacy merely, without other inequitable incidents, are very few, yet the doctrine is settled, by a consensus of decisions and *dicta*, that even in the absence of all other circumstances, when the inadequacy of price is so gross that it shocks the conscience, and furnishes satisfactory and decisive evidence of fraud, it will be a sufficient ground for cancelling a conveyance or contract, whether executed or executory. Even then fraud, and not inadequacy of price, is the true and only cause for the interposition of equity and the granting of relief.”

Now the question in this case therefore, is, whether the inadequacy of the consideration in this transaction is so strong, gross and manifest as that it shocks the conscience and furnishes satisfactory and decisive evidence of fraud, and which, together with the alleged senility of the grantor makes out a case of fraud, for which action at law for damages may be maintained by an administrator.

It is said that there is a marked difference in the manner of practicing fraud or deception in cases redressable in law from those for which a remedy in equity is furnished—

“Fraud in law, and for which redress in damages is afforded, is intentional, or acts tantamount to intentional, while ‘fraud in

1912.]

Lepps v. Bryson.

equity includes all willful or intentional acts, omissions, and concealments which involve a breach of either legal or equitable duty, trust, or confidence, and are injurious to another, or by which an undue or unconscientious advantage over another is obtained.'

"Fraud, in equity, however, is generally not intentional falsehood, as it must be in law, but, on the contrary, consists in a breach of duty, or in taking advantage of a confidential relation, or in such acts or omissions as the law declares to be fraudulent in the absence of intentional falsehood or deception. It must be remembered, though, that equity has an original inherent and independent jurisdiction to relieve against every species of fraud, actual or constructive. So it follows that the chief difference in the manner in which fraud is dealt with by courts of law and of equity, is that the jurisdiction over constructive fraud is exclusive in equity, there being no remedy at law, although opinion is divided upon this in some cases. Intentional falsity is the chief distinguishing element between actual and constructive fraud, it always being an essential in actual, whereas it is not present in constructive, fraud." *Kinhead on Torts*, Section 715; citing *Wampler v. Wampler*, 30 Gratt., 454; *Holcomb v. Noble*, 69 Michigan, 397. See also Section 873, *Pomeroy's Equity*, see also Section 873, *et seq.*, *Pomeroy's Equity*.

It is not meant to state here that relief can be afforded in equity against all kinds of fraud, but only to show that any inequitable conduct which is not accompanied by affirmative false representations is remedial in equity under the classification of constructive fraud.

An interesting, instructive decision touching upon the point of this case very closely is that of *Bancroft v. Bancroft*, 110 Cal., 374. The allegations of the complaint in that case were made up almost wholly of acts of duress which were charged as being the fraudulent inducement for the obtaining of certain transfer of stock in a corporation accompanied by an inadequacy of consideration. It was stated in the syllabus in that case that:

"Where a plaintiff has been led solely through the undue influence of the defendant to transfer stock in a corporation to the defendant for an inadequate consideration, the exclusive remedy in such a case is a prompt rescission of the contract, or an offer to rescind it, so as to put the other party *in statu quo*; and if he fails to rescind promptly, he thereby affirms the contract, and can not maintain an action for damages upon the ground of undue influence in procuring the transfer."



It is stated in the opinion of the court:

“It is admitted that no case can be found in all the books where a general action for damages has been maintained upon the ground of undue influence in procuring a sale or other contract. In *Le Caux v. Eden*, 2 Doug., 594, the question was whether an action at common law could be maintained for an imprisonment on a capture at sea *as prize*, and Buller, justice, said: ‘There is no case in which it has ever been holden that such an action would lie; and if it could be maintained, there are, in every way, such frequent opportunities for it that it must have happened in every day’s practice, or some instances at least must have been in the memory of those who have had long experience in “Westminster Hall”’; but there is not the smallest trace of such a determination, or even *dictum*, in any court in England. A universal silence in Westminster Hall on a subject which so frequently gives occasion for litigation is a strong argument to prove that no such action can be sustained.’ That case was decided in 1781, and dealt with litigation which could arise only out of the exceptional condition of war. How much stronger, therefore, is the authority of more than another hundred years of ‘silence’ in the courts of both England and America, upon a subject which, both in peace and war, ‘so frequently gives occasion for litigation.’ But in addition to this negative authority, it is clear upon principle that this present action should not be maintained, because to maintain it would be to violate the wholesome and fundamental doctrine that in such a case the party claiming to be aggrieved must promptly rescind, or offer to rescind, so as to put the other party *in statu quo*. He can not wait to speculate on future contingencies. The sale from appellant to respondent was not void; it was only voidable upon restoration of the consideration paid. It has been held, it is true, that an action to recover damages for a deceit or fraud will lie; *but that is on the ground that the party defrauded had no knowledge of the facts constituting the fraud.* [Italics ours.]

“The provisions of our Civil Code, all construed together, do not change the law on the subject. If it be said that a case could be imagined where the facts constituting the alleged undue influence *were not known* to the complaining party, and that there rescission should not be required, it is sufficient to reply that the case at bar is not such case.”

I am much impressed with the argument of the dissenting opinion in the case just cited, and believe that “precedents go down before principles anyway,” but I can not bring myself



1912.]

Lepps v. Bryson.

to believe that after this transaction was had between the deceased Reed and the defendants, and after his continued enjoyment of the property during the remainder of his life (and as agreed by counsel here, the same has been divided among his heirs in partition subsequent to his death), that there is enough in the evidence here to warrant the submission of this case to the jury for the award of any damages against the defendants on the theory that there is a sufficient showing here to make out a case at law for the recovery of damages in tort.

The testimony offered is that the only affliction which the deceased Reed had was old age. It clearly appears that he exercised much precaution in making this transfer; he listed his property with a real estate agent for sale; he was anxious to get away from the farm because he was unable to work the farm on account of his age. He wanted some income property, something that would yield him a revenue without labor, because he was unable to work. He had a wife and two young children. When this property was offered to him for transfer, he took the precaution of having two competent real estate men give their opinions to him as to the value of the property which he was to receive in trade. The evidence shows that a report was made to him that the cash sale value of the property was \$3,500, whereas the trading value was \$3,750. With that knowledge he made the contract for the sale and exchange. Thereafter it appears that his son interfered in order to prevent him from transferring the property.

It would seem as though the desire to repudiate the transaction, if any he had, was more because of the attitude of his son than any notions of his own. It appears from the evidence that he made the transfer of the deed without any dissent, without any objection having been made. The desire to get rid of his farm which he was unable to handle, and to install his family in property which could be used for renting rooms, etc., may have been considered by him as a sufficient consideration in making the transfer.

The testimony as to the value of his farm is that it was worth between \$7,300 and \$8,000. The only difference between the values, so far as the evidence is concerned, would be in the neighborhood of \$2,000. Many a person who is not afflicted

with senility has been willing to make a sale of property at a sacrifice for the purpose of changing their condition. I think that because of his situation, his old age, the fact that he had a young wife and young children, and of his desire to change his location from the farm to the city, in a house near the University where roomers could be obtained, tends to show that there was no such gross inadequacy of consideration as would even warrant a court of equity in setting the deed aside.

For these reasons, and because precedent seems to establish the rule that there is no remedy at law in damages for the alleged fraud that is now claimed from the evidence in this case, the motion to direct a verdict in favor of the defendants is sustained.

#### PROCEEDINGS FOR A JOINT COUNTY DITCH IMPROVEMENT.

Common Pleas Court of Defiance County.

A. M. ANDERSON ET AL V. J. W. MILLER ET AL.

Decided, 1911.

*Ditches—Validity of Bond for Joint County Ditch Improvement—Sufficiency of Joint Meeting of County Commissioners—View for Purpose of Locating and Establishing Ditch—Adjourned Meeting of County Commissioners Not Effective where Held Without Notice to Interested Parties—Section 6537.*

1. A bond, filed with an application for a joint county ditch improvement and signed by one of the petitioners as principal and by two other petitioners as sureties, is sufficient.
2. A single joint meeting of the commissioners of two counties, at the head of the main line of a proposed joint county ditch, without the holding of other meetings as to the laterals, is sufficient.
3. It is not necessary that all the members of the joint board, or a majority of each board, should be present to constitute a sufficient "view" for the location and establishment of the route for a proposed joint county ditch.
4. Adjournment of a joint board of county commissioners without fixing a day or place for the next meeting, after voting down a motion to approve the engineer's report concerning a joint county ditch, is an adjournment *sine die*, and no presumption of knowledge of any proceedings of the joint board after such adjournment is raised by an entry on the record of a later meeting, reciting

1912.]

Anderson v. Miller.

that it was held "per agreement," where such later meeting was in fact held without notice; and in the absence of a showing that interested owners had knowledge that such a meeting was to be held, injunction will lie to prevent the carrying out of the improvement; but if the joint board fixes a time and place for a new hearing and gives notice thereof to interested parties, proceedings relating to the ditch may be continued and completed as from the adjourned meeting.

A number of land owners filed their petition with the county auditor of Defiance county, Ohio, and a duplicate or a copy thereof with the county auditor of Paulding county, praying that the joint board of county commissioners of these two counties order an improvement by deepening, widening and straightening, of a natural water-course known as Gordon Creek, situated partly in each of these counties, and for like improvement of certain tributaries of that creek, all having a common outlet through the main stream into the Maumee river in Paulding county. Along with the petition a bond was filed in and upon which one of the petitioners was designated as principal, and two others of the petitioners as sureties. The joint board met at stake "O" of the main improvement, but did not meet at stake "O" of any of the tributaries or laterals. From stake "O" of the main improvement a majority of each board, and therefore a majority of the joint board "viewed," at least in a general way, and for substantially all of the distance, the line of the main improvement as well as the lines of the several laterals. The evidence tended to show that portions of the journeys along the different lines of the improvement were taken in carriages at some considerable distance from the proposed improvement and that in thus "viewing" the proposed improvement and the lines thereof, members of the individual boards, sometimes one and sometimes two, did not see and therefore did not "view" the whole line of any one of these water-courses. That some of the members rode a while and then walked a while, thus changing off from time to time. In other words, while it is true that two members of each constituent board were always passing along the line of and "viewing" these creeks, the personnel of the individual boards, and, therefore, of the joint board, was not always the same. After the meeting at stake "O" of the main line of

the improvement and the "view" had as above stated, the joint board granted the prayer of the petition and appointed an engineer to survey and make estimates in the usual way. The engineer had filed his report prior to March 31, 1909, on which date the joint board, in pursuance of a previous adjournment to that effect, met at Cecil, Paulding county. At that meeting a motion to approve the engineer's report was duly voted upon and lost. Thereupon, the joint board adjourned without fixing or announcing day or place for another meeting. In July, 1909, without having caused any notice of such meeting to be given, the joint board met at Defiance and again took up the proceeding or attempted to do so. The entry upon the journal of the commissioners of this last meeting recites that the joint board met "per agreement." Upon this state of facts the plaintiffs—180 in number—insisted that the proceedings of the joint board were fatally defective and should be perpetually enjoined: First, because the bond was insufficient and conferred no jurisdiction; second, because the "view" was invalid and that the joint board did not thereby acquire jurisdiction to proceed; third, that the joint board lost jurisdiction, if it ever had any, by the adjournment of March 31, 1909.

*H. & R. Newbegin*, for plaintiffs.

*R. H. Sutphen*, Prosecuting Attorney, and *Harris & Shaw*, contra.

BAILEY, J.

The court will proceed at once to what were in the hearing called jurisdictional questions, that is, questions raised by the plaintiffs against the jurisdiction of the joint board of commissioners.

1. The bond was sufficient. *Keys v. Williamson*, 31 Ohio St., 561; *Anderson v. Commissioners*, Defiance Circuit Court (not reported).

2. A single meeting at the head of the main line of the improvement was sufficient. The statute (General Code, 6537) does not require other meetings to be held upon the laterals. The general purpose of this initial meeting is to give the land owners an opportunity to be heard for and against the proposed im-

1912.]

Anderson v. Miller.

provement. A single meeting accomplishes that purpose as well as any greater number would.

3. The court finds that in traveling along the route of the proposed improvement a majority of both boards and, therefore, a majority of the joint board, substantially complied with the statute. When it is remembered that all the lines of this improvement follow natural water-courses, it would be exceedingly technical to hold that, because not all, nor a majority of each board of commissioners saw every foot, or even every quarter of a mile, of every one of these several natural water-courses, the board failed to acquire jurisdiction. The court is unwilling to go that far.

4. The adjournment at Cecil, March 31, 1909, without fixing time or place for another meeting, presents a more serious question. In ditch proceedings but one notice is required, but it seems to the court that such notice should be kept good by a continuity of adjournments. *The Euclid Ave. Sav. & Bank. Co. v. Hubbard*, 22 C.C., 20.

In *Sheidler v. Commissioners Putnam County*, a case recently decided by the Circuit Court of Putnam County (unreported), the four-county joint board adjourned April 12, 1905, as follows:

“Moved by George, seconded by Hampshire, that this board adjourn to meet at call of the president. All voted yes; motion carried.”

In the opinion of the circuit court rendered by Hurin, J., they disposed of a troublesome question in the following language:

“We are of the opinion that the joint board might adjourn to meet subject to the call of its chairman if the necessities of the case so required. The delay occasioned by the case in Wood county and the delay now occasioned by this proceeding are illustrations of the fact that it would be impossible for a board to adjourn under such circumstances to a fixed date or from day to day. Our Supreme Court has held that the powers conferred upon the commissioners in the statutes relating to ditches are political and not judicial and the commissioners in their deliberations are by statute authorized to act in conformity with the known rules of parliamentary practice. The power to adjourn subject to call is fully recognized in parliamentary law, when the occasion may require and justify such adjournment.”

This court does not feel called upon to decide as between these two circuit court decisions, assuming that they conflict, which this court does not now decide, for this court must follow its own circuit. In the case at bar the adjournment of the joint board was not to meet at the "call of the president." There was nothing in the situation to lead the land owners in attendance upon the Cecil meeting to understand or believe that the board would ever meet again. A motion to approve or adopt the report of the engineer had just been lost, and without any notice or hint of a subsequent meeting, the board adjourned. There was nothing to prevent the fixing of a time and place of meeting, as there was in *Sheidler v. County Commissioners, supra*. In that case the circuit court certainly reached a very liberal construction in sustaining the adjournment in question, and this court is not inclined to go beyond what is there held.

Notwithstanding the adjournment *sine die* of March 31, 1909, for that is what it amounts to by its terms, the joint board, without a new notice to the land owners, assumed to meet some two or three months later "by agreement" and take up and carry forward the improvement. The statute does not in terms require a second or new notice. The records show no such notice and in the judgment of this court upon the adjournment of March 31, the burden of proof was upon the defendants to show that the several hundred landowners, or at all events, these plaintiffs, were served with some kind of notice of the next meeting.

If without new notice to the interested parties subsequent meetings could be held and further proceedings had, then it might as well be said that all proceedings in ditch improvements, after the initial meeting at the head of the improvement, may be secret. The court does not believe that the right of the landowners and the citizens to be heard throughout the proceeding to final judgment can be thus cut off. There should have been some kind of *continuity of adjournments*, or a *new notice*. If this view of the situation is correct the jurisdiction and power to proceed stopped or became suspended March 31, 1909, and unless such jurisdiction and power have been recovered or revived, the board was not authorized to meet again. The court does not find anything in this record showing such recovery or revival.

1912.]

Anderson v. Miller.

This is a very large and important improvement, estimated to cost \$66,000. It is proposed to issue bonds of the counties to pay the cost of the improvement in the first instance, and later collect the money from the assessed lands. This makes it important that the proceedings of the joint board be fairly and substantially regular and in accordance with law; otherwise great difficulty might be experienced in disposing of the bonds at a full price. And again, if the defendants should prevail in this case, many other interested persons who are not parties nor privies to the litigation might possibly institute new litigation from time to time individually or in groups, and in that way delay, worry and possibly wear out, in a sense, the public officers having to do with the collection of the assessments. It seems to the court that it would be much better for all parties to try to get a better record in this proceeding than we now have.

In this connection the court feels like suggesting that in a matter as important as this ditch improvement, involving the welfare of perhaps one-third of Defiance county, and the expenditure of so large a sum of money, public officials should be careful to proceed substantially according to law and avoid having such irregularities and omissions thrown upon a court with a single judge for decision. It is a matter of common knowledge among lawyers and courts in Northwestern Ohio, that it is with the greatest hesitation and reluctance that the courts disturb or hold invalid the acts of administrative officers and proceedings to establish public improvements. In the traditional language of an eminent jurist "Northwestern Ohio must be ditched, Constitution or no Constitution." But while the foregoing observations are true, it is also true that the courts can not brush aside all law and arbitrarily sustain a public improvement. The proceedings of inferior tribunals and courts are viewed with great liberality and are not set aside upon mere technicalities. But there should be a fair, a substantial compliance with the law.

Without going into detail and citing authorities, the court finds that the petition in this case is broad enough to reach the question and defect to which attention has been called, and that, notwithstanding the case of *Haff v. Fuller*, 45 Ohio St.,



495, a court of equity may restrain as against this jurisdictional defect. All opportunity to be heard was cut off. For aught that appears here many of these plaintiffs may never have heard of any proceedings in this improvement after March 31, 1909, nor until the right of appeal had been lost by limitation. *Miller v. Commissioners Logan County*, 3 C. C., 617.

No presumption arises upon the record of the ditch proceedings or upon this hearing that any of the plaintiffs had knowledge or notice of the proceedings of the joint board after March 31, 1909. It was incumbent upon the defendants to show such notice or knowledge, or legal opportunity for such knowledge. They have not done so. Therefore this case comes within the decision last cited.

For the above reasons the temporary injunction is made perpetual with this exception or modification: If the joint board should conclude to come together, fix a time and place for a new hearing and give proper notice thereof to all of the plaintiffs in this case and then at such new meeting take up the proceeding where it was left off at Cecil, March 31, 1909, they have the permission of this court to do so; and they will not be in contempt of this court if they take up the proceedings and carry them forward from that date to completion. The court does not attempt to guarantee the validity of such proceeding. But under the general scope of equity jurisprudence courts are not much concerned with mere irregularities or even serious errors unless the rights of the citizen are thereby cut off or seriously curtailed. This is especially true in view of our remedial and curative statutes, General Code, 6499, 6500. But these statutes do not cure nor save jurisdiction where there was none.

An entry may be prepared and spread upon the journal in accordance with the foregoing decision, saving exceptions and appeal to both sides and all individual parties desiring the same. Bond \$500 for the combined parties and \$200 each for individuals in case a single individual separately appeals.



1912.]

Metzger v. Zeissler et al.

**VACATION OF JUDGMENT DURING TERM.**

Common Pleas Court of Wood County.

GEORGE G. METZGER V. LEWIS ZEISSLER ET AL.

Decided, January 15, 1912.

*Procedure—Steps Required for Setting Aside a Judgment During Term—Inherent and Plenary Power of the Court With Its Limitations—How this Power May Be Invoked—Nature of the Showing to be Made at Preliminary Hearing—Summary of Procedure—Action by the Court Sua Sponte—Application of Rules Laid Down—Bond Required for Payment of Original Judgment or any Modification Thereof—Cognovit Notes and Rights of Sureties—Judicial Discretion—Sections 8296 and 11631 et seq.*

1. For the vacation of a judgment at the term of its rendition the defendant should file a motion setting forth one or more of the grounds specified in Section 11631, or any other grounds he may deem sufficient, and give the plaintiff reasonable notice in writing of such filing and of the time and place of the hearing demanded.
2. The defendant at the preliminary hearing should present, by affidavit or orally or by both methods, his evidence in support of the motion to vacate, and this evidence the plaintiff may controvert by affidavit or orally.
3. At the same time the defendant should proffer a verified answer to the petition, setting forth affirmatively facts showing non-liability in whole or in part. If the answer does not state facts which, if established, would constitute a defense to the claim, the proceeding will be treated as at an end and the judgment will not be disturbed; but if a good defense is stated, and the court upon hearing finds sufficient grounds for vacating the judgment, an order will be entered setting forth the grounds so found and suspending the judgment, and providing for making up the issues in the usual manner, and if necessary an injunction will be granted as provided for in Section 11638.
4. After the issues have been made up the cause stands for trial to a jury or to the court in the regular way and as though no judgment had been previously rendered. If the trial results in a verdict or finding for the defendant, which withstands a motion for a new trial if one is filed, the original judgment will then be vacated and a judgment entered confirming the verdict or finding; but if the verdict or finding is for the plaintiff and for the same amount originally found due, that judgment will stand and a

proper order will be entered confirming it, or if a different amount be found due an entry will be made modifying the original judgment accordingly.

5. In the case under consideration it is held the claim that judgment was taken for more than was due is not competent at a preliminary hearing, but by an irregularity in the confession of judgment on the note in suit the accommodation makers were not accorded their right to be certified as surety in the judgment on the note, which authorizes the court in the exercise of its discretion to permit the judgment to be opened up.

*Benj. F. James and Earl D. Bloom, for plaintiff.*

BALDWIN, J.

At the September term, 1911, of this court, to-wit, on December 4th, a judgment for \$2,130 and costs was entered in favor of the plaintiff and against the defendants, Samuel J. Herringshaw, Mrs. J. Y. Herringshaw and Lewis Zeissler. At the same term, on December 13th, the defendants filed their motion to vacate the judgment, the specific ground set forth in the motion being "that the judgment was for more than was due the plaintiff, and that the defendants were not summoned or otherwise legally notified of the time and place of taking such judgment," thus covering the statutory ground provided in the ninth subdivision of Section 11631, General Code. On the last day of the term the motion was heard and at the conclusion of the hearing the matter was continued to the present time for consideration and decision.

On the hearing, it developed that the defendants' counsel being in doubt as to the proper course of procedure, and as a precautionary measure, had also filed a petition for the same purpose and caused summons to issue thereon. This latter action was no doubt prompted by the requirement of Section 11635, General Code, which provides that the proceeding to vacate on the ground mentioned in subdivision nine shall be by petition duly verified.

The defendants on the hearing also submitted affidavits, not only relating to the ground alleged for vacating the judgment, but also relating to their defense to the note, and setting forth facts proper to be considered in a trial on the merits.

1912.]

Metzger v. Zeissler et al.

The presentation of the case was thus attended with some confusion, growing out of the uncertainty and undefined course of procedure in actions of this kind. The case in this respect does not stand alone. An inspection of the reported decisions discloses that efforts to vacate judgments at the same term, have been pursued variously and indiscriminately along one or more or all of these different lines of procedure, viz.: under General Code, Chapter 5 of Division 3, providing for new trials; under General Code, Chapter 6 of Division 4, providing for "other relief after judgment"; and by invoking the inherent power of the court to vacate or modify its own judgments during the term at which the judgment was rendered, which is a common law creation.

It is desirable that the practice in matters of such importance should be defined, and have some uniformity and certainty. To this end I will endeavor to prescribe what is deemed the proper procedure and apply it in this case, in the hope that it may also afford a fixed rule of practice in similar cases or provoke some reviewing court to promulgate something better.

I am aware that the same subject has been considered by other courts, notably by Judge Washburn, in *Burrell v. Insurance Co.*, 3 N.P.(N.S.), 321, and by the circuit court of this circuit, Judge Haynes delivering the opinion, in *Smead Foundry Co. v. Cheshbrough*, 18 C. C., 783. While the same ideas underlying this opinion were touched upon in those cases, they were not formulated into tangible practicable rules. To do this is the present purpose.

Taking up the three methods of procedure hereinbefore referred to in their order:

Division 3, Chapter 5, prescribes the method of obtaining a new trial. The heading of this division is "Trial," and the word is defined in Section 11376. "A trial is a judicial examination of the issues, whether of law or of fact, in an action of proceeding." The entire division relates to proceedings in contested matters, where issues of law or fact, or both, are raised and litigated, and prescribes the conduct of a cause from the commencement of the trial until its termination by verdict of a jury or

decision by the court. It takes the litigated case to the point where it is ready for a judgment, but makes no provision for a judgment, nor for the vacation of any judgment. Chapter 5, Sections 11575 to 11581 of this division, provide a remedy by means of a new trial after verdict or decision and before judgment. This chapter with the exception of Section 11580 which is adopted in the chapter relating to relief after judgment, has no application and can not be resorted to in a proceeding to vacate a judgment.

The next code provision on the subject is found in Chapter 6 of Division 4. The heading of this division is "Judgment," and therein is prescribed the manner of giving and entering judgment. Chapter 6 under the title, "Other relief after judgment," among other provisions prescribes clearly and definitely the procedure to be followed to vacate a judgment *after the term at which it is rendered*. It needs no elucidation in its application to proceedings after the term. And the chapter requires no consideration except in so far as some of its provisions may be applicable to proceedings to vacate a judgment at the same term of its rendition, and this question will be treated in the discussion of the method to be pursued in the last named proceeding. We have noticed all the code provisions especially providing for the vacation of judgments, and find that no procedure is provided by the code for vacating a judgment at the same term at which it is rendered.

That such remedy ought to and does exist no one can deny. That a court invested with specific statutory power to vacate a judgment after the term of rendition, is powerless to exercise that function at the same term when it is shown that the judgment is wrong, is not only an absurdity, but in many cases might work injustice and injury.

At common law the court is endowed with the power of control over its own orders and judgments during the term at which they are rendered, and the power to vacate or modify them in its discretion.

This doctrine, recognized and applied in *Huntington v. Finch*, 3 O. S., 445, and in earlier cases, has been reiterated and re-

1912.]

Metzger v. Zeissler et al.

affirmed in *Bank v. Doty*, 9 O. S., 505; *Niles v. Parks*, 49 O. S., 370; *Huber Mfg. Co. v. Sweeny*, 57 O. S., 169, and other decisions of our Supreme Court, and is the settled law of Ohio.

The code of civil procedure nowhere abrogates this rule of law. While undoubtedly specific provisions of the code relating to the remedy must prevail over the common law practice, yet where the code is silent as to the method to be employed to secure a remedial right which exists at common law, the right is not thereby lost, nor can it for that reason be denied. When the code was adopted in 1853 its very first provision was this preamble:

“The rule of the common law, that statutes in derogation thereof, are to be strictly construed, has no application to this code. Its provisions and all proceedings under it, shall be liberally construed, *with a view to promote its object and assist the parties in obtaining justice.*”

This declaration is embodied in Section 10214, General Code. This inherent and plenary power of the court thus affords the remedy, and as I hold, the only remedy for the vacation of a judgment at the same term of its rendition. It is not an unlimited power, but has certain restrictions and limitations. The common law limitation is, that it may be only resorted to in the exercise of a sound discretion.

To my mind there are statutory restrictions alike applicable to a proceeding such as this. Chapter 6 of Division 4 by its general title, “Other relief after judgment,” and by the subject-matter of certain of its sections as well, indicates that these sections which are not restricted to proceedings after the term, should have general application to all proceedings to vacate. Consequently the court in this action has no power to vacate the judgment until it is adjudged that there is a valid defense to the action, as provided in Section 11637.

The question next arising is: For what reasons or upon what grounds may the court vacate its judgment at the same term? Since any of the grounds specified for vacation after the term, if they exist at all, must have had their inception at or before the time of the rendition of the judgment, no reason is prescribed

why if good after the term, they are not equally good at the same term at which they come into being.

I therefore hold that either of the grounds set forth in Section 11631 which are warranted by the facts of the particular case, may be resorted to. And in addition to these any other reason or ground, dictated by a sound discretion, may afford the basis for the action.

This is especially decided in *Manguno, etc., Co. v. Clymouth*, 19 C. C., 237.

Next, how should the exercise of this power be invoked? That the court in a proper case may exercise it *sua sponte*, subject to the restrictions hereinbefore stated, I have no doubt. If a party seeks to avail himself of the remedy, he may properly do so by motion under favor of Section 11370, General Code. And in a proceeding at the same term, this is the only appropriate method. The filing of a petition in such case is unnecessary and improper, even though the grounds relied on are embraced in the reference made in Section 11635. This for the reason that the plaintiff is constructively in court when he obtains his judgment and remains there throughout the term, while his judgment is subject to vacation or modification by the exercise of this common law power; hence the process of summons is unnecessary to bring him in, and only the usual notice is necessary which is provided to be given of intended action in a pending cause.

Another point as to which there is contrariety of opinion is, as to the nature of the showing to be made upon the hearing of the motion. Some take the view as did counsel in this case that upon the hearing of the motion, it is necessary to produce evidence in some form as to the validity of the defense, and here we have affidavits from both sides pertaining to the merits of a case which either party may of right demand shall be submitted to a jury for determination. This showing upon the merits upon presentation of the motion is unnecessary and improper, because the court at that time is not called upon to pass upon the merits of the defense; this is distinctly and pointedly held in *Watson v. Paine*, 25 O. S., 340, and repeated in numerous decisions following.

1912.]

Metzger v. Zeissler et al.

The only question to be preliminary tried is whether or not grounds for vacation exist. The proof thereof may be made by affidavit or oral evidence or both, and may be controverted in like manner. Whereupon if ground for vacation is found to exist, issues are to be made up in the regular way on which the validity of the defense is to be determined. The better practice as I regard it, is to require the defendant moving for vacation to proffer with his motion an answer duly verified, setting forth his defense, which answer should be not merely a general denial of the petition, but should aver facts showing non-liability. This method seems to be countenanced at least in *Lee v. Benedict*, 82 O. S., 302, 2d syllabus.

Summarizing and putting in practical form the course of procedure to be pursued in the vacation of a judgment at the same term of its rendition, it should be as follows:

1st. The defendant complaining should file his motion in the original action setting forth the grounds upon which the vacation is asked, which may be (a) one or more of the grounds specified in Section 11631, General Code; (b) any other or different grounds which he conceives to be sufficient to warrant the action invoked. Whereupon he should give reasonable notice in writing to the plaintiff of such filing and of the time and place a hearing will be demanded.

2d. Upon the preliminary hearing, the defendant should present his evidence in support of the grounds to vacate, either by affidavit or orally or both, which the plaintiff may controvert in either manner. At the same time the defendant should proffer a verified answer to the petition setting forth affirmatively facts showing non-liability in whole or in part.

3d. If the answer proffered does not state facts which if established, would constitute a defense to plaintiff's claim, the proceeding ends and the judgment will not be disturbed. If the answer does state a good defense, and if the court upon hearing find sufficient grounds for vacating the judgment, an order should be entered finding that certain grounds exist for vacating the judgment, but without entering an order of vacation. The order should suspend the judgment, and if necessary may include



the injunction provided for by Section 11638, General Code. The order should further provide for making up the issues in the usual manner.

4th. After the issues are made up, the cause stands for trial in the regular way. If it be a jury issue it will be tried to the jury; if a court issue to the court. Either issue is tried in the same manner as an original action, and as though no judgment had been previously rendered. If the trial results in a verdict or finding in favor of the defendant which withstands a motion for new trial if one be filed, then and not till then, will the original judgment be vacated, and a proper judgment be entered conforming to the verdict or finding of such trial.

If the trial result in a verdict or finding for plaintiff, the same as the original judgment, that judgment will stand and a proper order should be entered confirming it. If for a different amount, an order should be entered modifying the original judgment accordingly.

Applying these rules, we come now to consider the facts: The ground relied upon by defendants in this motion, viz., that judgment was taken for more than was due, would involve an inquiry into the merits. This I do not think is competent in the preliminary hearing in any proceeding of this character. In this case that question would be for a jury. In my opinion this fact is to be determined from an inspection and computation of the note, and that the court may not proceed to inquire whether the note should be reduced or extinguished by counter-claim, payment or impeachment. This ground is provided as a safeguard against fraud, collusion or mistake on the part of the attorney in fact, who may be and generally is a stranger to the maker, having no interest in his protection. This is the only apparent reason why this ground is by statute restricted to cognovit notes. If it contemplated an inquiry into the merits in the case of a cognovit judgment, it is difficult if not impossible to see why the same remedy should be denied in the case of other judgments.

An inspection and computation of the note upon which judgment was taken discloses that the judgment is not entered for



1912.]

Metzger v. Zeissler et al.

more than is apparently due thereon. Therefore relief on this ground is denied. It is shown by an affidavit in the case, uncontroverted, that the defendant, Samuel Herringshaw, was at the time of executing the note and warrant of attorney, and he still is an infant. And it was further shown that this minor was in fact the principal, and the other defendants were accommodation makers or sureties. These facts were urged upon the hearing as a reason why the judgment should be opened up. The note is a joint one, and is not joint and several. The warrant of attorney to confess judgment likewise only authorizes the confession of a joint judgment against all three of the makers. The principal being under the disability of infancy, had no legal capacity to authorize confession of judgment against himself. The confession was as to him either void or voidable; if the latter, he has by his present action disaffirmed it. Eliminating him, we have a judgment confessed which to the extent it is legal and effective, the attorney in fact was not authorized to make.

The rule is well established that warrants of attorney to confess judgment must be strictly construed. See *Cushman v. Welch*, 19 O. S., 536; *Spence v. Emerine*, 46 O. S., 433.

It has been held that a principal on a note, joint in form, can not complain because a judgment has been taken against him alone, omitting his sureties. It would seem, however, that sureties may, so as to save to them the rights of reimbursement and contribution so far as they may be worked out in the original action.

It was contended by plaintiff's counsel in argument that under the negotiable instrument act, there is no recognition of the relation of surety to a note, because Section 8296, General Code, provides that all persons who sign the instrument on its face as makers are primarily liable. I do not agree with this contention. By Section 8134 they are denominated "accommodation makers," and I apprehend the right to be certified as surety in a judgment on the note is still preserved.

It seems to me that this irregularity in the confession of judgment authorizes the court in the exercise of its discretion to permit the judgment to be opened up. The defendants have sub-

mitted an answer duly verified which states a complete defense to the note in the hands of the endorsee. The affidavits filed relating to the merits (which as I have said were unnecessary at this stage), however, indicate that it is doubtful whether the defense can be maintained against the present holder. It further appears from the record that soon after the rendition of the judgment, proceedings in aid of execution were begun, and a satisfactory showing was made upon which an order was granted to reach personal property which it is alleged one of the defendants refused to disclose or submit to execution.

Inasmuch as no lien has attached to such personal property, which could be preserved under the statute, the right of the plaintiff to enforce his judgment is valid, ought not to be jeopardized, and consequently the judgment ought not to be opened up, unless it be upon terms which will afford reasonable protection to the plaintiff.

The right to impose terms in a case like this has been upheld by our circuit court in *Brenzinger v. Bank*, 19 C. C., 536.

Therefore the conclusion and order is, that if the defendants within ten days, give bond in the sum of \$2,150 with sureties to the approval of the clerk for the use and benefit of plaintiff, conditioned for the payment of the original judgment or any modification thereof as finally determined, an order will then be entered finding that ground exists for vacating the judgment, and providing for making up the issues and trial on the merits. If the defendants fail to give such bond within the time named, the motion will be overruled and the application denied.

Defendants include in the motion a request that the original payee in the note, McCracken, be made a party defendant. He is neither a necessary nor proper party. This motion is overruled.

1912.]

Equipment Co. v. Kaufman.

**BILL OF EXCEPTIONS NOT PART OF THE COSTS.**

Common Pleas Court of Franklin County.

**THE CINCINNATI EQUIPMENT COMPANY v. GEORGE B. KAUFF-  
MAN ET AL.**

Decided, January 19, 1912.

*Costs—Are Given Only by Statute—Expenses of Litigation Distinguished  
from Costs—Section 11624.*

The word "costs" has a fixed legal significance and includes only such items as are allowed by statute, and the expense of preparing a bill of exceptions for the purpose of prosecuting error can not be taxed as a part of the costs.

*Stewart & Stewart, for plaintiff.**Crum, Raymond & Hedges, contra.***KINKEAD, J.**

This matter is submitted upon an agreed statement of facts.

The question is whether the sum of \$44.25 paid by the plaintiff for a transcript by the stenographer, constituting the bill of exceptions for the prosecution of proceedings in error from the judgment of this court to the circuit court, are a part of the costs in the case.

The circuit court reversed this court, and the parties thereafter agreed upon a settlement of the case, the defendants as a part of such adjustment agreeing to pay the costs of the case. When it came to the payment of the costs it was found that there was the sum of \$44.25 due for the payment of the expense of the bill of exceptions. And there the dispute arose, the plaintiff claiming that this sum constituted part of the costs, and the defendant claiming that the same was not a part of the costs.

Stenographer's fees are not taxable as costs unless authorized by statute. 11 Cyc., 125.

Under the statutes and rules of court of some jurisdictions, stenographer's fees for a copy of a transcript of evidence are

taxable as costs in the case, if necessary for the purpose of an appeal but not otherwise. 11 Cyc., 232.

“The term ‘costs’ has a legal signification and includes, only such costs as are properly taxable by statute. Costs were unknown to common law. They are given only by statute, and may be changed, or entirely taken away, at the will of the Legislature.” Kinhead’s Practice, Section 841; *McDonald v. Page*, Wright, 121.

“The word *costs* has a legal signification. It includes only those expenditures which are, by law, taxable, and to be included in the judgment.” *Farrier v. Cairns*, 5 Ohio, 45, 48.

“It is equally certain that he had acquired no right to any judgment for costs. This must depend upon the statute law in force at the time judgment should be rendered. Costs are unknown to the common law. They are given only by statute, and may be changed, or entirely taken away, at the will of the Legislature.”

*C., C. & C. R. R. Co. v. Bartram*, 11 Ohio St., 457, 467:

“Indeed, we know that at common law the parties were never entitled to judgment for *costs*, they were *only* entitled to judgment for their *right* or *claim*, for which the action was brought, or ‘to go hence without day,’ as the case may be.”

In *State v. Auditor*, 77 O. S., 333, on page 339 it is stated:

“Costs, in the sense the word is generally used in this state, may be defined as being the statutory fees to which officers, witnesses, jurors and others are entitled for their services in an action or prosecution and which the statutes authorize to be taxed and included in the judgment. \* \* \* The word does not have any fixed legal signification. As originally used, it meant an allowance to a party for expenses incurred in prosecuting or defending a suit. Costs did not necessarily cover all of the expenses as they were distinguishable from fees or disbursements. They are allowed only by authority of statute, and the word not having a fixed legal signification, it does not follow that the compensation of the expert, though an expense, is costs made in the prosecution.”

Section 11624 provides that costs shall be allowed, of course, to the plaintiff upon a judgment in his favor in actions for money and for recovery of real or personal property.

1912.]

Telephone Co. v. Telephone Co.

Judgment for costs may be awarded against the plaintiff when the judgment is in favor of the defendant.

In other classes of cases the court is empowered to apportion the costs between parties within its discretion. Section 11628.

There is nothing in the statute relating to proceedings in error concerning the assessment of costs which would throw light upon the question.

The conclusion must be that there is no statute authorizing the taxation of the expense of the bill of exceptions for the purpose of prosecution of error, as part of the costs.

The finding upon the agreed facts, therefore, is that the expense of the bill of exceptions is not to be paid as part of the costs.

#### DUPLICATION OF TELEPHONE SERVICE.

Common Pleas Court of Clinton County.

THE CLINTON TELEPHONE CO. v. THE NEW BURLINGTON  
MUTUAL TELEPHONE CO.

Decided, 1912.

*Telephones—Construction of the Public Utilities Act With Reference to Extension of Lines Into Territory Already Occupied—Section 614-52.*

The public service commission of Ohio has full authority to regulate extension of telephone lines into territory covered by the charter rights of the company proposing to make such extensions, where such territory is already occupied by the lines of another telephone company.

BROWN, J.

This case comes before the court upon a general demurrer to the answer, which counsel agree will determine the question involved. The plaintiff in its petition asks for an injunction restraining the defendant from extending its telephone lines from a point it occupied July 1st, 1911, into localities occupied by plaintiff from the vicinity of New Burlington, to and

through Kingman and out to Wilmington, Oakland and Harveysburg pike and thence to Oakland and Wilmington.

The plaintiff states that it is a corporation under the laws of Ohio for the purpose of owning and operating a telephone plant in Clinton county, its principal office being at Wilmington; that it was chartered in 1899 and has a complete telephone system in said county; that the defendant is a similar corporation and has a small plant in and near the unincorporated settlement of New Burlington. The plaintiff states that the defendant has never extended its lines nor attempted to operate its system in the immediate vicinity of New Burlington, but that the plaintiff has fully covered the territory over which the defendant seeks to extend its lines and is able, willing and ready to give adequate service to all persons in said localities. It states the passage by the legislature of the public utilities act of May 31st, 1911, creating a public service commission and numbered Section 54 of Vol 102 O. L., p. 564, which provides:

“No telephone company shall exercise any permit, right, license or franchise that may have been heretofore granted but not actually exercised, or that may hereafter be granted to own or operate a plant for the furnishing of any telephone service thereunder in any municipality or locality where there is in operation a telephone company furnishing an adequate service, unless such telephone company first secures from the commission a certificate after public hearing of all parties interested that the exercising of such license, permit, right of franchise is proper and necessary for the public convenience.”

The plaintiff claims that the true intent of this law was to prevent a multiplicity of telephone systems, and to confine this service to one well regulated company, and that the defendant without applying to or obtaining permission from the public service commission, is extending its lines and causing infringement into plaintiff's territory as alleged; that this will damage the value of plaintiff's property causing irreparable injury for which it has no remedy at law.

The defendant in its answer admits the general averments as to both parties being telephone systems, that it has extended

1912.]

Telephone Co. v. Telephone Co.

its lines from time to time since 1909, and at the time of the granting of the temporary restraining order herein was extending one of its lines to Kingman and a cross line from Oakland towards Harveysburg to be operated under its plant at New Burlington; that it has demand from numerous persons in that territory for its service. It admits the enactment of the public utilities act and the enactment of Section 54 as set forth in the petition, but claims that the facts stated in the petition do not warrant the application of Section 54 to it; that the defendant's rights under its charter and its plant were established in 1909, before said act became regulative, and that its proposed extensions over the New Burlington plant are not within the purview of that statute and if said Section 54 be so construed it is contrary to the Constitution of Ohio and void. Wherefore it prays that the petition be dismissed and it be allowed damages.

This in substance briefly states the issue between the parties, and the demurrer to the answer which searches the record will now be considered.

As counsel state we are plowing new ground in Ohio in respect to public utilities. There are no decisions upon the subject in any state. Wisconsin is the leading authority upon these questions, and its statute has been referred to and submitted by counsel. By carefully considering the purposes of these acts, we readily see that the intention of the Legislature was to avoid multiplicity of telephones as well as to give good service at reasonable rates to the people of the state. There is surely nothing in the enactment, and particularly of Section 54 which is unconstitutional as against the inherent rights of the defendant, nor was this in fact strongly insisted upon by defendant's counsel. The principal contention of defendant's counsel was that the plant having been established in New Burlington prior to its enactment, the company has full authority of law to extend its lines within the territory granted by its charter, without interference by the public service commission created by the act.

There is no doubt in my mind that where two companies had prior to this enactment extended their lines throughout the

same territory, that this could and would not be effective in compelling either company to abandon such territory.

It is admitted by defendant's counsel that if a new plant were constructed, for instance in Wilmington, it would be in violation of Section 54, but that this plant having been heretofore established and in continuous operation over New Burlington, Section 54 does not apply.

A plant of a telephone company is not the same as a plant of an electric light company or other similar public utility. A telephone plant consists of its central office or offices, its wires, lines and extensions, and from a central office in New Burlington its plant could be extended indefinitely. The whole intention of the act, and the proper interpretation of Section 54, seems without doubt in my mind to indicate that public service commission has full authority under the statute in regulating any company which has not actually exercised its permits, rights, licenses or franchises, by actual extension into the territory authorized by its charter. I am of the opinion that the answer does not state a good defense in this respect, and that the averments of the petition cover the facts which would require an investigation and authority of the public service commission, and that before the defendant could exercise its franchise in territory already occupied by another telephone company, that it should comply with Section 54, by securing from the public service commission a certificate that the exercise of its license, right permit or franchise is proper and necessary for the public convenience, before it extends its lines. This can readily be done and after a full hearing, if any injustice is being done, the public service commission under this act can readily remedy the same. It is therefore my duty under this view of the law, which is very clear to me, to sustain the demurrer to the answer which is accordingly done. Counsel will furnish the necessary journal entry, which Judge West will approve unless there is some further question to be submitted.



1912.]

Price &amp; Co. v. Railway.

**LIABILITY OF CARRIER FOR APPLES DAMAGED IN  
TRANSIT.**

Superior Court of Cincinnati.

I. N. PRICE &amp; COMPANY v. THE ERIE RAILROAD COMPANY.

Decided, July, 1912.

*Carriers—Action on a Bill of Lading—Custom or Usage Will Not be  
Considered, When—Liability for Apples Rendered Unsalable in  
Transit.*

1. Where, in the absence of explanation, the bruising, mixing and freezing of a car load of assorted apples resulting in their practical destruction appears to have been due to the fact that the closed box car in which they were shipped became disabled in transit, and to their transfer into an open and unsuitable box car, the railway company is liable for the total loss occasioned thereby.
2. In an action on a bill of lading, a court will not consider a usage or regulation affecting the mode or place of delivery, with reference to which it is claimed the shipper contracted, where such usage or regulation is unreasonable in its operation and contrary to public policy.

*G. F. Osler and Nelson & Hickenlooper, for plaintiff.*

*C. Bentley Matthews and Harry T. Klein, contra.*

HOFFHEIMER, J.

This is an action on a bill of lading to recover the value of a carload of apples consigned by plaintiff's agent at Lockport, New York, to plaintiff at Cincinnati. The cause was tried to the court and a jury, at the April term, 1912 (April 30), and at the conclusion of all the evidence, both sides having moved for an instructed verdict, the same is for the determination of the court on the evidence and the law.

The apples involved in the shipment were clean hand-picked stock, and the four varieties (Baldwin, Northern Spy, Greening and King) had been carefully binned. Shipment was made November 7, 1903, and in a tight box car of the New York, Lake Erie & Western Railroad, being car No. 27,952. Delivery of

the carload of apples was attempted at Cincinnati November 23, 1903. The apples tendered plaintiff were not in the tight box car of the New York, Lake Erie & Western Railroad, No. 27,592, but were in an entirely different lading—an open stock car of the Pere Marquette Railroad, being car No. 28,034. The apples thus tendered were not binned, the varieties were no longer separated, but said apples were indiscriminately piled up in the car, and they were badly bruised, chopped up, mixed with dirt and cinders, and frozen.

Plaintiff, immediately upon inspection of the merchandise thus tendered refused to accept same. Defendant afterwards, so it is alleged in the answer, sold same, crediting itself with the expenses of transportation and holding some small balance in its hands for the benefit of plaintiff.

Aside from plaintiff's mere statement, during the course of the trial, that the apples he saw "might have made a car of cider apples," there was a complete failure to prove that the apples as tendered were of any real or substantial value. On the contrary, the fair inference to be drawn from all the evidence is that, as a shipment of graded apples, same was practically worthless to consignee.

Under the particular circumstances of this case, considering the change of lading that was made without any knowledge on plaintiff's part, involving some doubt, possibly, as to identification of the merchandise tendered, and considering, also, the confusion of the grades, as well as the apparently worthless condition of the fruit, I am of opinion that the rule which ordinarily requires the consignee to accept the merchandise consigned and afterwards make claim for any damages suffered, should not, in justice, be applied here, and that the case should be considered, under these circumstances, as one of total loss. *Thomas & Company v. Wabash Railway Company*, 62 Wis., 642; *G. R. & I. Railroad Co. v. Warren*, 16 Ill., 502.

It appears, from the evidence, that the car in which the apples were originally shipped became disabled *en route*, and that the change of lading without plaintiff's knowledge took place at Dayton, Ohio, November 13, 1903. At that point defendant trans-

1912.]

Price &amp; Co. v. Railway.

ferred these apples from the original *tight box car* in which they had been binned, into an open stock car, piling the apples indiscriminately in the car and without regard to grades. According to Mr. Devereaux, of the United States Weather Bureau (called by defendant as an expert), these apples began to freeze on the 17th, 18th and 19th of November, on which dates the minimum temperature was 23 degrees, 18 degrees and 18 degrees, respectively. Mr. Devereaux testified further, that the apples would have commenced freezing, in an open stock car, at 25 degrees. And further, that, had said apples remained in the tight box car, instead of being placed in an open stock car, they would not have frozen, whether delivered at Ivorydale on the 15th (the date upon which defendant claimed same reached Ivorydale), or on some subsequent date and prior to the 20th or 21st (the date on which plaintiff was notified as to the whereabouts of the car) because, according to this same expert, they would have been safe in a box car until a minimum temperature of 15 degrees was reached; and there was no such temperature within the days mentioned.

The presumption that defendant was negligent in causing or permitting the original box car to become disabled *en route*, and likewise in transferring these apples into a car which, considering the perishable nature of the merchandise and the circumstances, was wholly unsuitable, has not been rebutted. Indeed defendant has offered no evidence on these matters whatsoever. The negligence of defendant in respect of said matters directly contributed to the condition of the merchandise and to the freezing which, although in itself an act of God, under the evidence could have been prevented by due care in respect of the matters referred to. Defendant having received the apples in good condition, has wholly failed to sustain the burden that devolved on it, namely: of showing that the loss or destruction of the apples was not due to its negligence, or that such loss was due to some cause for which it was not responsible. *Moore on Carriers*, pages 396, 389, 387, 391, 220 to 224; *3 Hutchinson on Carriers*, Section 1354; *Graham v. Davies*, 4 O. S., 362; *Union Express Co. v. Graham*, 26 O. S., 595; *United States Express Co. v. Bach-*

*man*, 28 O. S., 144; *Gaines v. Transportation Co.*, 28 O. S., 418; *P., C., C. & St. L. Railway Co. v. Mitchell*, 175 Ind., 135, Syllabus 10.

As to necessity for furnishing a suitable car for transportation, see *Forester v. Southern Railway Co.*, 147 N. C., 553; 15 *American & English Annotated Cases*, 143.

In said case it was held:

“It is the duty of a carrier to furnish cars suitable for the shipment of the particular commodity undertaken to be conveyed, and if injury results to such commodity from the unsuitableness of the cars for the shipment thereof, the carrier is liable.

“Where it appears that a ventilated car is the only safe means of transporting dried apples, a carrier which, having undertaken to transport said apples, carries them in an ordinary box car, is liable for the damages resulting from the unsuitableness of such car for such shipment.”

And in *Beard v. Ill. Central Railway Co.*, 79 Iowa, 518 (7 L. R. A., 280), the court say:

“The nature of the goods must be considered in determining the carrier’s duty. Some metals may be transported in open cars. Many articles of commerce when transported must be protected from rain, sunshine and heat and must have cars fitted for their safe transportation. \* \* \* Fruit and some other perishable articles must be carried with expedition and protection from frost. So the carrier must attend to the character of the goods he transports.”

And see, also, *Fookins v. Express Company*, 99 Minn., 404; *Brennison v. Penn. Railroad Co.*, 100 Minn., 102.

The proximate cause of the cutting up of these apples, of their becoming mixed with dirt and cinders, of their frozen condition, that is to say, of their practical destruction, was defendant’s unexplained negligence in the matter of the damaged car and the transfer of the apples into an unsuitable open stock car. It is, therefore, liable to plaintiff for the value of this shipment, unless its second defense is available.

1912.]

Price &amp; Co. v. Railway.

The first defense, after admitting the receipt of the apples and the bill of lading, was, in effect, a general denial, but the second defense sets up an alleged rule or usage governing the use by plaintiff and other provision brokers, of track space in defendant's Cincinnati yards for the selling by them of goods in bulk and directly from their cars; and it is contended that, by reason of plaintiff's allotted space in the Cincinnati yard being full at the time the car arrived at Ivorydale (as defendant claims on the 15th), the damage was occasioned while defendant was holding said car at Ivorydale for plaintiff, and, hence, while it was acting as warehouseman only, and, in the absence of affirmative proof by plaintiff that defendant was negligent as warehouseman, defendant claims that plaintiff can not recover.

In view of the evidence of plaintiff that it was making all efforts to locate its already delayed shipment, and that it could not find or locate same until the agent of defendant, Mr. Williams (who in turn was making efforts to trace it), notified plaintiff, on the 20th or 21st, that it was at Ivorydale (he having at said date received such information from Jersey City), it is difficult to understand upon what theory defendant expected plaintiff to know that the car containing plaintiff's merchandise was at Ivorydale on the 15th (if it actually was there on said date), when its own officers (as evidenced, by the acts of Williams in making trace) seemed to have been unable to locate the merchandise.

The difficulty—and it is likely enough that there was difficulty—in locating the car (if the car was actually at Ivorydale on the 15th) was, in all probability, due to the change of lading. But if the car containing plaintiff's merchandise was at Ivorydale on the 15th, and if the shipment was in good condition at that time, if the usage pleaded was valid and binding and of a character to terminate its liability as carrier, surely it could not be available for such purposes as of the date mentioned, because, without any notice to plaintiff of the arrival of said car on said date, there could not have been constructive delivery at such time, and plaintiff, as already stated, had no knowledge as to the whereabouts of the car, and reasonably could not have had, in

the absence of knowledge of the change of the lading, until the 20th or 21st (when it was so notified by defendant's agent Williams); and prior to said date the damage actually occurred.

If, however, the court is in error in any of these deductions, and notwithstanding agent Williams' efforts to trace the car after the 15th, said car was at Ivorydale on the 15th, as defendant claims, the question would still be: Did defendant's liability as carrier cease and that of warehouseman begin on said date? The determination of this question involves the validity or legality of defendant's second defense.

It is admitted by plaintiff that, together with the other provision brokers, it used the track space of defendant in Cincinnati for selling produce in bulk from its cars; and it appears that the rule had been promulgated by the railroad company, about three years prior to the loss of the car involved herein, governing such use of defendant's track space in the Cincinnati yards and the holding of dealers' cars at Ivorydale. This rule, with its limitations, it is to be noted, is not one that can be said to have been, in its entirety, the result of the course of business of the brokers, but, as framed, it was an arbitrary rule devised, established and enforced by Mr. Barnard, the joint agent of the C., H. & D. and Erie railroads. Moreover, there was no peaceful acquiescence in said rule by this plaintiff. Mr. Barnard frankly admitted that plaintiff, as well as Mr. Bender of Bender, Streibig & Company, Mr. Markley, and others, repeatedly protested against the rule. Indeed, Mr. McLeod, official over Barnard, on plaintiff's protest, as I recall the evidence, promised to take the matter up but, notwithstanding said promise, the rule continued in operation, and was in operation at the time complained of and up to the time Mr. Skinner succeeded Mr. Barnard, when this alleged usage, or custom, or regulation, was abrogated by the railroad company itself.

The evidence shows, further, that after the promulgation of this rule or regulation by the railroad, a number of dealers in produce or provision brokers (competitors of plaintiff) formed combinations or groups, referred to in the evidence as the "Irish Push" or the "Jewish Push," for the purpose of pooling their

1912.]

Price &amp; Co. v. Railway.

individual allotments (which had been figured by Mr. Barnard on the business done by the individual dealer during the preceding year), and that the aggregate allotment, as thus pooled was under the control of some person in the joint employ of the group or combination. The evidence shows, also, that each group or combination so formed and so operated was actually recognized as a group or combination by the railroad, irrespective of the individual allotment of the members thereof. The result of such recognition by defendant railroad of said groups or combinations, as must be obvious, gave to the individual members of such groups or combinations first choice in bringing in cars to any vacancy in the aggregate allotment of such groups, notwithstanding the individual's allotment was already full, to the exclusion of the independent provision broker or dealer, such as was this plaintiff, or Bender, or Markley, or others.

In view of these apparent results in its operation, such a regulation can not be held to have been a reasonable one, and inasmuch as it placed it in the power of the combinations, through their members, to keep cars loaded with produce and belonging to independent dealers out of the local market and hence out of the possibility of competition, it was clearly contrary to public policy. The rule was unlawful as establishing an unreasonable preference or advantage, by virtue, also, of Section 3 in the federal act to regulate commerce (24 U. S. Statutes at Large, page 379):

“It shall be unlawful for any common carrier, subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm or corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.”

In *Rogers Company v. Penn. Railroad*, 12 I. C. R. R., 309, speaking of discrimination against shippers, in the use of a congested yard for receipt of shipments, it was said, by Lane, Commissioner:



“That the embargo (against complainant and others owing to congestion in the yard, still allowing others to receive shipments there) constituted an unlawful discrimination against complainant by defendants, is apparent and indisputable. Whatever may be said of an embargo against one commodity only in a time of congestion, nothing can be said for an embargo which refuses transportation facilities to some establishment, while affording such facilities to their competitors. If the exercise of such a power were to be at all tolerated, carriers would be able to issue sentence of commercial death against some of their patrons, while continuing to serve others.”

And again:

“There is no distinction in principle between a discrimination in furnishing of facilities with which to originate a shipment and such a discrimination as is here shown, in the furnishing of facilities with which to receive a shipment.”

To sustain the validity and legality of the alleged usage or the reasonableness of the regulation, defendant cites the court to several cases: *Laughlin Bros. v. Philadelphia, etc., Railroad*, 74 Atlantic Report, 418; *Carr v. Delaware Railroad Co.*, 75 Atlantic Report, 928; *Chicago, etc., Railroad v. Ryman*, 75 Northeastern Rep., 587.

Attention to these cases will show that in none of them was discrimination practiced or allowed affecting the place of delivery, but, on the contrary, there would seem to have been absolute equality among shippers.

*Laughlin Bros. v. Philadelphia, etc., Railroad Company*, which is earnestly relied on by defendant “as being on all fours” with the case at bar, on the contrary illustrates the precise point made by Lane, Commissioner (*supra*). The court say, at page 418:

“The trial judge held, that the evidence showed the custom in the trade, above noted, to deliver to consignees only, at the delivery yard, Second and Masters street, but, on account of the limited space in that yard, its use as a market place, *to deliver not more than three cars at a time to any one person or firm, and to deliver additional cars only as those first delivered were empty and released.*”



1912.]

Parkinson v. Crawford.

The case cited by defendant, therefore, as sustaining its second defense are all to be distinguished from a case such as the one under consideration, where inequality appears.

Conceding that, in an action on a bill of lading a usage rule or regulation may be shown, *affecting the mode or place of delivery*, and with reference to which the shipper must be supposed to have contracted, same will not be considered by the court where, as here, it appears to have been not only unreasonable in its operation, but contrary to public policy. Being unlawful, this alleged usage, or rule, as set out in the second defense, can be no defense. *Continental Wall Paper Co. v. Voight*, 212 U. S., 223, 262.

For the reasons given, this plaintiff is entitled to judgment for the full amount of its claim, namely, \$406.54, with interest at six per cent. from November 7, 1903.

Judgment accordingly.

---

### PROCEEDINGS IN ATTACHMENT.

Common Pleas Court of Franklin County.

MAME PARKINSON v. FRANK A. CRAWFORD.

Decided, May, 1912.

*Attachment—Where Directed Against Excess Over Ninety Per Cent. of Personal Earnings of a Married Man—Demand in Writing Not Necessary—Service on Agent of Defendant—Statement as to Nature of Claim Sued on—Failure to Aver that the Claim was Incurred in the County—Service of Process by Special Constable Not an Elector of the Township—Sections 10272, 10266, 10253, and 1732.*

1. The provision of Section 10272, making a demand in writing a prerequisite to the bringing of a suit in attachment for the excess over and above ninety per cent. of the personal earnings of the debtor, is applicable only to cases where it is sought to reach personal earnings of married men.

2. A return of summons, served on the "agent" of the defendant company within the county in which the action was brought, will not be set aside, although it is the better practice to follow the statute strictly.
3. The statement in the affidavit that the plaintiff's claim is for "board, lodging and washing" is sufficient to save the action from a motion to discharge the attachment; but it is necessary that more facts be stated in the bill of particulars.
4. Failure to aver in the affidavit that the claim was incurred in the county in which the suit is brought, renders the affidavit insufficient and requires that the attachment be discharged.
5. Proof that the special constable, appointed to serve the process, was not an elector of the township in which the action was brought, is ground for discharge of an attachment based upon such service.

*C. W. Reynolds*, for plaintiff.

*Jas. B. Yaw*, contra.

KINKEAD, J.

This is a three day appeal from an order made by a justice of the peace overruling a motion to discharge attachment seeking to sequester the personal earnings of an unmarried person. It is alleged in the affidavit that he is not the head of a family, has not the support of a widowed mother dependent upon him for support, that the property sought to be attached is not exempt, that all the earnings is sought to be attached, and that defendant is a non-resident.

The first question raised on motion to discharge is whether demand is essential in such case. Looking to the provisions of Section 10272 as it stands in the General Code, without considering its history and purpose, it would seem to apply as well to attachments for necessities against single men, as of married men. But looking to its purpose and history as well as to the matter of exemptions in favor of married men which are not extended to single men, it is plain that Section 10272 as originally enacted—as Section 6501, Bates—provided that demand was only essential in cases where the personal earnings of a married man were sought to be reached.

The statute prescribing that demand shall be made, must be considered in the light of the statutory exemptions as to per-

1912.]

Parkinson v. Crawford.

sonal earnings, as well as with a view to the history of the sections—10272 and 10273—and the purpose and intent of the amendments brought into the statutes April 26th, 1898, and April 16, 1900. At the latter date it was provided that when any part of the personal earnings of a debtor is *not* exempt under the provisions of Sections 5430 and 5441 of Bates' Revised Statutes, the garnishee may pay to such debtor an amount equal to ninety per centum of such personal earnings. This, in other words, withdrew from already existing exemptions ten per cent. of the personal earnings which may be reached by a debtor on a claim for necessities (93 O. L., 316, 321). On April 16, 1900 (94 O. L., 376), a further amendment was made imposing a liability on the debtor to pay \$4 on the costs, and providing that the person seeking recovery of the ten per cent. shall first make a demand in writing for the excess over and above ninety per cent. of the personal earnings of the debtor.

The only exemptions of personal earnings previous to these two amendments were the personal earnings of the debtor, and of his minor child, for three months previous to attachment when the same are necessary to the support of the debtor and his family. Code, Section 11721 (5430). The other was the \$500 in lieu of a homestead extended to husband and wife or widow or widower having care of a minor child. Code, Section 11738 (5441).

There never was, nor is there now, any exemption existing in favor of a single person, so that a creditor may sequester all of the personal earnings of such a person. So that it is plain that the provision requiring a demand in writing for the excess over and above ninety per cent. of the personal earnings can only apply to cases where it is sought to reach the ten per cent. of the earnings of married men. In this class of cases the rule of practice adopted in this court is uniform that such demand is a prerequisite to obtaining jurisdiction.

It follows that this ground for discharge is not well taken and is overruled.

Another ground for a discharge of the attachment is that the return does not show service upon the agent of the railroad

company in accordance with the statute. Section 10266 does provide that it must be left with the president, etc., or *managing agent*, if a corporation or with any *regular ticket or freight agent* of a railroad company.

The return shows it to have been left with "the agent of the within named Co. in Cols. Franklin Co."

I am of opinion that this is a sufficient substantial compliance with the statute, although it would be much better to follow the statute strictly.

It is also urged as an objection that "the nature of plaintiff's claim" has not been set forth in accordance with the statute. The affidavit states that the action is for board, lodging and washing. That seems to be sufficient in the affidavit, although it would require more facts to be stated in the bill of particulars.

An objection is made that the affidavit does not state that liability was incurred in Franklin county, and hence is violative of Section 10253. This section does provide that: "No proceedings in attachment shall be had to garnishee the salary or wages of an employe of a railroad company, except before a justice or on account of his being *a non-resident of the county in which the liability was incurred.*"

The affidavit does fail to state that the liability was incurred in Franklin county.

The presumption can not be indulged in that this liability was incurred in Franklin county, because the rule is that in courts of limited jurisdiction such as justices courts, all the facts requisite to confer upon it jurisdiction must be averred and proved. Counsel has called attention to a form covering this requirement in Swan's Treatise (22d Ed.), p. 399.

The principle expressed in *Leavitt v. Rosenberg*, 83 Ohio St., 230, would seem to apply and require that the affidavit should contain an averment of every essential required by statute.

This makes it imperative upon the court to hold the affidavit insufficient. This ground of motion is, therefore, sustained.

It is claimed that the person deputed to serve the process shall be one who possesses the qualifications of an elector of the

1912.]

Parkinson v. Crawford.

township in which the justice issues the process. Section 1732 provides that a justice may, on request of a party, specially deputy a discrete person of suitable age, not interested in the action, to serve process.

Section 1733 provides that the person so deputed shall have the authority and be subject to the obligations of a constable.

It is argued that as Section 4, Article XV, provides that no person shall be elected or appointed to any office in this state, unless he possesses the qualifications of an *elector*, the person appointed to serve the process in this case was improperly appointed because he was not a *resident* of the township.

A number of Ohio decisions are cited to show that, under the law, the person deputed by the justice to serve the process is an *officer* within the meaning of the Constitution.

An *officer* is one who exercises in an independent capacity, a public function in the interest of the people by virtue of law (*State v. Jennings*, 57 O. S., 415), upon whom is devolved the performance of independent statutory duties, which to a certain extent, involves the exercise of part of the sovereignty of the state. *State v. Coon*, 26 O. C. C., 241.

The identity of an officer is to be determined by the functions that belong to it in law. *Kirker v. Cincinnati*, 48 O. S., 507.

An officer is one "who performs the duties of that office." *Hamlin v. Kassafer*, 15 Pas., 78; 15 Oh. R., 456; 3 Am. St. Rep., 176.

Emolument is a usual but not a necessary element to constitute an office. *State v. Kennon*, 7 O. S., 546; *State v. Anderson*, 45 O. S., 196, 199.

Article XV, Section 7, of the Constitution provides that every person chosen or *appointed* to any office of this state, before entering upon the discharge of its duties, shall take an oath to support the Constitution, and also an oath of office.

The appointment of the constable is under Sections 1732 and 1733 (formerly Sections 603 and 604) as before stated.

If it be concluded that a special constable appointed by virtue of the above sections be an *officer* within the meaning of the Constitution, then it must appear that he was an *elector*.

Section 1733 contemplates that "for the service, execution, and return of such process," the "persons so deputed shall have the authority and *be subject to the obligations of a constable.*"

Sections 1732 and 1733 were a part of the act passed March 14, 1853, regulating the jurisdiction and procedure before justices of the peace, and of the duties of constables in civil cases. This act contained fifteen articles and two hundred and twenty-three sections.

Article XIV containing the two sections involved was entitled "general provisions."

Article XIII of this enactment related to constables and their duties. Sections 3331-3345 and Sections 1732 and 1733 were all a part of this article.

The plan of selection of constables is disclosed by this article. The same provisions are now found in Chapter 5 of the General Code, except that Sections 1732-1733 are now found in another part of the code.

First it is contemplated that constables shall be elected biennially (3327). In case of a vacancy by death, removal or non-acceptance and a vacancy occurs, the township trustees shall appoint a person to fill the vacancy.

Then it is provided (3331) that a justice of the peace may appoint constables for special purposes in certain cases. And at the request of a party, and on being satisfied that it is expedient, a justice may specially depute a discrete person of suitable age, not interested in the action, to serve process (1732), and for *the service*, execution, and return of such process, a person so deputed shall have the authority and be subject to the obligations of a constable.

In these cases where persons are appointed to fill a vacancy, or where the constable is appointed for a special purpose, when there is no constable in the township, or if the regular constable is disabled, or the constable is a party to the suit, or where the constables are unable to perform the duties required of the office, it is required that the persons appointed shall take oath as in other cases.

1912.]

Parkinson v. Crawford.

In Sections 1732 and 1733, the special deputation is made at the request of a party and for the service of process in the particular cases. The only requirement made by such special appointment is that he shall be a *discrete person of suitable age*, and that he shall have the authority and be subject to the obligations of a constable.

Under the definitions above given, and according to the statute under which the special constable was appointed, in the service of the particular process, he is performing, for the time being, the duties of the office of constable by virtue of law. The obligations of a constable, during the period of his engagement, are by law imposed upon him. He is, therefore, a special constable, and a special officer.

An elector is one who resides in the state for one year next preceding an election, and who also resides in the county, *township, or ward*, in which he resides. Article V, Section 1, Const.

An elector is a person possessing the qualifications fixed by the Constitution, and duly admitted to the privileges secured, and in the manner prescribed by that instrument. *O'Flaherty v. Bridgeport*, 64 Conn., 169; *Beardstown v. Virginia*, 76 Ill., 34; *Bergevin v. Curtz*, 127 Cal., 86; *State v. Tuttle*, 53 Wis., 45.

The requirement of the statute that he shall have the authority and be subject to the obligations of a constable means to impose upon him the same responsibility, and the same requirements provided by the Constitution and the laws of the state. These are that he shall be an elector of the township in which the justice who appointed him resides and officiates. That he should take an oath as do regular constables and others who are specially appointed under Sections 3329-3332 seems clear. This is an obligation imposed upon other regular constables. Whether he shall give an original bond, for each service as is required by regular constables, or whether the justice and his sureties are to be held liable for any neglect of duty or illegal proceedings on the part of such constable appointed by him under Section 3333 (40 O. S., 646) may not be easily determined.

To be subjected to the obligations of a constable the law ought to be so construed as to require that either a bond, or the obliga-

tion of the justice who appoints him, and his sureties, under Section 3333, shall be responsible for any neglect of duty or illegal proceedings by him.

It certainly is contrary to the spirit, intent and purpose of the law that parties should institute attachment proceedings in the township where none of the parties reside, and have their own special constable appointed who does not reside in the township, and is not an elector thereof, and has no responsibility other than himself, as a regular or general practice.

This practice, and the course pursued in this case, is on principle and law not desirable nor legal. Being pursued regularly, it constitutes an abuse of the apparent discretion which is conferred on the justice by virtue of Section 1732. When a party requests the appointment of a special officer for the service in the particular case, the justice must be *satisfied that it is expedient* to make the appointment, and this discretion should be exercised in limited cases, and not carried into general practice. By holding that the person appointed shall be an elector of the township will take away the opportunity for an abuse of discretion in a certain way. When there are regularly elected and qualified and acting constables in a township, special appointment of special constables under Section 1732 ought not to become the practice. It ought to be the exception. The fact that the law provides that no fee is to be taxed for his services in the costs, makes it evident that a practice of having a special constable appointed under this statute will tend to show that such special constable may have a special interest in the suit different from the regular constable who will demand the regular fee.

These are some of the reasons which may be advanced in favor of a restrictive rule such as is here laid down.

And the motion to discharge the attachment is sustained on the further ground that the proof shows that the constable appointed to serve the process in this case was not an elector of the township.



1912.]

Carpenter v. Traction Co.

**EXERCISE OF MUNICIPAL POWER FOR THE PURPOSE OF  
EFFECTING BY INDIRECTION A PURPOSE  
DIFFERENT FROM THAT  
EXPRESSED.**

Superior Court of Cincinnati.

DAVID L. CARPENTER V. THE CINCINNATI TRACTION CO. AND THE  
CINCINNATI STREET RAILWAY CO.; AND DAVID L.  
CARPENTER, A TAX-PAYER, V. THE CITY OF  
CINCINNATI, THE CINCINNATI TRACTION  
CO. AND THE CINCINNATI STREET  
RAILWAY CO.

Decided, May 7, 1912.

*Municipal Corporations—Circumstances under which Courts of Equity  
May Interfere with Administrative Municipal Government—Mo-  
tives of Council Immaterial—Exercise of Power for a Purpose Dif-  
ferent from that Expressed—Nullifying the Statutory Restrictions  
as to Granting Street Railway Franchises—Bartering Away Po-  
lice Power—Seeking to Prevent Future Legislation Affecting the  
Public Safety and Well-being—Evidence—Burden of Proof.*

1. Courts of equity will not interfere with municipal corporations in their internal police and administrative government, unless they are transcending their powers, or some clear right has been withheld or wrong perpetrated or threatened, which must be proved by the petitioner by a preponderance of issuable facts, upon which the court can base its judgment, irrespective of the motives of members of council.
2. A municipal council possesses only such powers as are delegated to it by the state, which powers must be exercised in good faith for the accomplishment of the object for which the power is delegated, and not colorably for such a purpose in order to accomplish another object for which the power is denied to it by the state.
3. Ordinances passed by council, ostensibly in the exercise of a power to change the names of streets, but really for the purpose of nullifying the law of the state, forbidding the grant of a railway franchise unless certain conditions are complied with, are invalid.
4. An ordinance, granting a street railway franchise, bartering away the state's police power, as well as the right of future councils to legislate upon topics relating to the safety and well-being of the public, is invalid.

*Frederick Hertenstein and Dinsmore & Shohl*, for plaintiffs.

*Alfred Bettman*, City Solicitor, for the City.

*Joseph Wilby and George H. Warrington*, for the street railway company and the traction company.

SPIEGEL, J.

These two cases were tried jointly to the court, and from the evidence submitted on the trial the following state of facts has developed: The plaintiffs in case No. 55091 are owners of property abutting on Reading road, between Clinton Springs avenue and Paddack road. During the summer of 1911, the inhabitants of Bond Hill located at the end of Paddack road, and recently annexed to Cincinnati, resumed their endeavors to to obtain street car service to Cincinnati, organizing a Bond Hill Welfare Association for that purpose. The latter communicated with the traction company, which declared its willingness to extend its Avondale line by single track to a point just south of the crossings of the N. & W. and B. & O. Railway, but not to Bond Hill proper, provided the Bond Hill Welfare Association would secure the necessary consents for the construction of said extension, as well as secure the passage of the necessary ordinances granting this extension, with the proviso, that the traction company should be exempt from the payment of any part of the cost whatsoever for the elimination of the grade crossings referred to, or any expense whatsoever for the privilege of operating over the roadway, either over or under the railroads. The traction company stated very frankly to the Bond Hill Welfare Association that it had not been desirous of extending its line to Bond Hill, because investigations made showed no possible adequate return from the construction of an extension, and the cost of building a double track extension precluded any possibility of netting an adequate return on the investment.

At a mass meeting of the Welfare Association of Bond Hill, held September 8th, 1911, this proposal of the traction company was unanimously adopted. In accordance with Section 9105 of the General Code of Ohio, prohibiting council from granting a street railway franchise until there was produced to it the

1912.]

Carpenter v. Traction Co.

written consent of the owners of more than one-half of the feet front abutting on each street, along which it was proposed to construct a railway or an extension thereof, the members of the Bond Hill Welfare Association endeavored to obtain the signatures necessary in order to enable the council to act. They obtained the almost unanimous consent of property owners on Paddack road, but the property holders on Reading road refused to give their consent to have an extension built on said road. Public meetings were held in Bond Hill, and at one of these meetings at which several councilmen were present, among whom was Mr. Michael Mullen, the floor leader of council, the plan was evolved to change the name of the entire Paddack road to Reading road, and a small stretch of Reading road beyond Paddack road to Reading boulevard, whereby the majority of consents of abutting property holders on this new street called Reading road could be secured and the opposition of the property holders on Reading road proper would thus be overcome. Mr. Mullen frankly testified that he suggested this plan to the mass meeting, as he as well as council were anxious to give Bond Hill street railway communication with Cincinnati. Mr. Mullen further testified that Mr. Withrow, Chairman of the Bond Hill Welfare Association, presented these ordinances changing the names to the proper council committee, which reported the ordinances favorably to council, and which passed them without any hearing in council in respect to these changes of names. Similarly the ordinance granting the street railroad franchise was recommended favorably by the proper committee to council, the majority of written consents of property owners on the old Paddack road changed to Reading road greatly outnumbering the dissents on Reading road proper, these consents having been re-signed after the passage of the ordinances changing names.

Against this action of council the first suit, No. 55091, was brought on November 22d, 1911, by the abutting property owners on the Reading road in Avondale, who are named in said action, and which suit is against the Cincinnati Street Railway Company and the Cincinnati Traction Company. The second suit was filed later by Mr. David L. Carpenter, on behalf of the city of Cincinnati, as a tax-payer, against the city of Cincinnati

and the two street railroad companies named. In both actions the plaintiffs pray that the ordinances changing the names of streets as well as the ordinance granting the street railroad franchise be declared invalid, and that the defendants be enjoined from constructing said street railroad extension and further carrying out the said contract between the city of Cincinnati and the said street railroad companies, and for such further relief as may be proper.

The first question which presents itself to the court, under the pleadings and the evidence is, what right has a judicial tribunal to review the determination of a municipal council expressed by the adoption of an ordinance?

The rule is expressed by Judge Dillon in his work on "Municipal Corporations" (Vol. 1, Sec. 243), in the closing sentence of the section:

"And generally the judicial tribunals will not interfere with municipal corporations in their internal police and administrative government, unless they are transcending their powers, or some clear right has been withheld or wrong perpetrated or threatened."

And the rule of legal determination to be applied is thus tersely stated by the same author (Vol. 1, Sec. 239):

"The extent of the powers of municipalities whether express, implied or indispensable is one of construction. And here the fundamental and universal rule, which is as reasonable as it is necessary is, that while the construction is to be just, seeking first of all for the legislative intent, in order to give it fair effect, yet any ambiguity or fair, reasonable, substantial doubt as to the extent of the power is to be determined in favor of the state or general public and against the state's grantee."

And here may be added the rule laid down by Mr. Brice in Greene's Brice's Ultra Vires (page 371):

"Powers conferred upon corporations for the attainments of certain objects must be employed by them strictly and solely with reference to those objects only."

It is well settled that the judicial branch of the government can not institute an inquiry into the motives of the legislative

1912.]

Carpenter v. Traction Co.

department in the enactment of laws, and in analogy to this rule it is true that courts will not in general inquire into the motives of a council in passing ordinances, but this rule has been qualified both by text-writers and the Supreme Courts of our states in this, that the acts of council may be impeached when the private property rights of a person or any civil right which is guaranteed by statute will be affected by the enforcement of the ordinance, and as the party aggrieved has no other adequate remedy for prevention of irreparable injury the courts sustain the right to relief by injunction. (Dillon's Municipal Corporations, Vol. 1, Sec. 650.)

In our state the same rule has been adopted. Our Supreme Court, in the case of *State v. The Ironton Gas Company* (37 O. S., page 45), has declared the rule to be as follows:

Syllabus 3. "The presumption is in favor of the good faith and validity of the action of the city council in passing such ordinance, and this presumption may only be overcome by the averment of issuable facts showing the contrary. It is only when the facts show, not a real but a mere colorable exercise of the authority vested in the council, that the ordinances can be held invalid."

Syllabus 4. "In the absence of facts showing fraud or bad faith on the part of the council, the inadequacy of the price of gas as fixed by the ordinance is not the subject of inquiry."

In accordance with the rule thus laid down by our Supreme Court, it will be the duty of this court to determine from the facts submitted by evidence whether the action of council in this instance was an exercise in good faith of its power to change the name of streets, or a colorable exercise of this power with reference to another object than the changing of street names.

A municipality can only exercise those powers which are delegated to it by the sovereign power of the state, and these powers thus delegated must be strictly construed.

Section 9105 of the General Code of Ohio limits the power of municipal councils to grant street railway franchises as follows:

"No such grant shall be made until there is produced to council, or the commissioners, as the case may be, the written consent of the owners of more than one-half of the feet front of the lots

and lands abutting on the street or public way, along which it is proposed to construct such railway or extension thereof; and the provisions of all ordinances of the council relating thereto have in all respects been complied with, whether the railway proposed is an extension of an old or the granting of a new route."

The power to change the name of streets in the manner in which it was done in the case before me, as shown by the evidence, is granted to municipal councils by the state in the following words:

"Section 3725. On a petition by a person owning a lot in the corporation, praying that the name thereof be changed, the council of such municipality upon hearing, and upon being satisfied that there is good cause for such change of name; that it will not be detrimental to the general interest, and that it should be made, may declare by ordinance the name of such street changed."

The following section of the code (3726), under which, however, the action of council was not taken and could not have been taken, provides that the latter without petition may change the name of a street when there are two or more of the same names in the municipality. Both of these sections are grants of power by the state to the municipal councils. Both powers must be exercised in accordance with the law of the state and not in contravention thereof. Under Section 9105 consent of a majority of the property owners on each street upon which council desires to grant a street railway franchise is a prerequisite to the power of council to grant permission to build a street railway therein; and the action of council in granting such permission is not conclusive against the property owners on the street of the fact that the requisite majority have given their assent to the construction of the street railway proposed. (*Roberts v. Easton*, 19 O. S., page 78; *State v. Bell*, 34 O. S., page 194; *Railway v. Near*, 54 O. S., page 153.)

The consents of owners of lots abutting on a street to the construction and operation of a street railway on such street, are not property rights that can be appropriated under eminent domain, but are a personal right to the owner of the lot, and a power or sword in his hands with which to protect his lot against

1912.]

Carpenter v. Traction Co.

the arbitrary powers of the city authorities. A majority of consents by the feet front is a condition precedent to jurisdiction to grant a street railway franchise, and each abutting lot owner is free to aid in conferring such jurisdiction, and free to withhold such aid. *Traction Co. v. Parrish*, 67 O. S., page 181.

The purpose of this statute is stated by our Supreme Court, in the case of *Roberts v. Eastman*, 19 O. S., page 86, as follows:

“The statute expressly prohibits the city authorities from permitting a street railroad to be constructed without such consent. It was therefore a condition precedent to the power of the city to grant the requisite permission to lay the track in controversy. The evident object of the act is to protect the owners of the property on the streets of cities therein referred to from the exercise of the arbitrary power on the part of the city authorities in permitting streets to be used for street railroads.”

The power to withhold this right of abutting property owners on each street lies with the state only. In fact, prior to the passage of the statute in question, unlimited power was given to municipal councils to grant street railway franchises without the intervention of abutting property owners, and the act in question was passed to take this power from councils. The General Assembly in its wisdom might have passed an act granting the same right to the abutting property owners, but making the power of council to grant a street railway franchise dependent on the consent of a majority of feet front upon all of the streets on which the proposed extension of the street railway is to be made, instead of a majority of feet front on each single street; but the state has not seen fit to do this, and council must obey the state's mandate. It is the Legislature, not council, that can give relief, when in its wisdom, such relief is proper.

Section 3725 of the General Code, under which the state has delegated power to municipalities to change the name of streets, when two or more streets do not have the same name, permits councils to do this upon determining the following jurisdictional facts: First, that there is good cause for such change of name; second, that it will not be detrimental to the general interest, and third, that such change should be made. The evidence introduced in the case at bar shows that two petitions were sub-



mitted to council which simply prayed for the change of the name of Paddack road to Reading road, and for a change of the name of a part of Reading road to Reading boulevard, without stating any cause for the change of said names. These petitions were referred by council to its committee on street railroads. This committee in both instances reported to council that these petitions be filed and recommended to council the passage of the ordinances changing the names named without stating that there was good cause for such change of name, and that it would not be detrimental to the general interest. Council, thereupon, on the same day that these reports were submitted, passed ordinances changing the names of these streets. The record of the proceedings of council show no determination on its part that there was good cause for such change of name, and that it would not be detrimental to the general interest. As testified by Mr. Mullen, council unanimously passed the ordinances believing that good cause for such change of names existed; that in making one street out of two distinct streets it enabled Bond Hill to obtain a majority of consents of abutting property holders on this one street, although said new street visibly consists of two streets, and that this procedure would override the objection of property holders on one of these streets, namely, Reading road; believing further, that this would not be detrimental to the general interest.

Laying aside for the present the question whether council can proceed in this manner without first by a vote expressing its determination that there was good cause for such change of names, and that such change was not detrimental to the public interest, let us examine from the facts submitted in evidence, whether this action of council was a *bona fide* exercise of the power vested in it under Section 3725, or merely a colorable exercise of power under this section, in order to circumvent the inhibition of the state as expressed in Section 9105, prohibiting council from granting street railway franchises until a majority consent of the front feet is obtained from abutting property holders on each street, as said streets existed at the time when the street railway grant was sought to be given to the street railway company. It is not necessary from the evidence submitted



1912.]

Carpenter v. Traction Co.

that the court should pass upon the motives of the members of council. The facts introduced, issuable facts as our Supreme Court calls them, makes this unnecessary. It does not even necessitate an application of the well known rule of equity that the court must look through the form for the substance, in order to do justice. The facts show that the petitioners to this change of names did not even state a cause for such change; that the committee to which these petitions were referred recommended to council that they should be filed and that the change of name should be made, and that council without passing by a vote upon the jurisdictional fact that a good cause for such change existed, and that such change would not be detrimental to the general interests, unanimously passed these ordinances for change of names; and the undisputed evidence before me shows that these ordinances were passed because council in endeavoring to grant the franchise to the street railway company, to extend the track of the Avondale line to Bond Hill, did not have the requisite statutory number of feet front of abutting property holders, on one street, Reading road, as required by Section 9105, to grant such franchises; that this change of names of entirely different and distinct streets was made to enable council to nullify the prohibition of the General Assembly against granting such franchises until the majority of consents was obtained on each existing street. Can it be contended for one moment that the general interest thus named in the statute authorizing the change of names can mean the interest of a particular section of the city, as opposed to the general interest of all the citizens in protecting their civil rights? Surely, the general interest called for by this section does not mean a particular interest, no matter how worthy, as compared to the general interest in the enforcement of all the laws by which council is governed, and from which it derives its powers and which protects all abutting property holders alike.

I have already cited the well known rule stated by Mr. Brice in his work on *Ultra Vires*, that powers conferred on corporations for the attainment of certain definite objects must be employed by them strictly and solely with reference to those objects only. A change in a street name when made by council must therefore.

form a part, and statutes upon cognate subjects may be referred to, although not strictly *in pari materia*."

Bearing these rules in mind, can there be any question that council has not the power to annul a law which prohibits it to grant a street railway franchise except under certain conditions which did not exist, by exercising a power granted to it by another statute for an entirely different purpose, namely: the changing of street names when good cause is shown, and the change is not detrimental to the general interest. This power, as shown by the evidence, was not exercised for the bona fide purpose of changing street names, but was colorably exercised by council for the purpose of enabling it to grant a street railway franchise, although the conditions did not exist under which it was authorized so to do; not for the *bona fide* purpose of changing the name of a street, predicated as the law provides upon good cause being shown, and not being detrimental to the public interest as opposed to a particular interest.

I have not inquired into the motives of the members of council. If, however, they are disclosed by the evidence submitted of issuable and probative facts, the court is acting within the rules governing a judicial review of governmental bodies, including of course municipal corporations, rules which I have stated and which are fully upheld by the United States Supreme Court in the case of *Soon Hing v. Crowley* (113 U. S., page 703):

Syllabus. "The court can not inquire into the motives of Legislatures in enacting laws except as they may be disclosed on the face of the acts or be inferable from their operation considered with reference to the condition of the country and the existing legislation."

Upon a careful examination of the law and the evidence in the case at bar, I can only find that the two ordinances changing the name of Paddock road to Reading road and part of Reading road to Reading boulevard were not passed as a bona fide exercise of the power given to council to change the name of streets for the general interest, but that the passage of said ordinance was a colorable attempt of council to evade the prohibition of the

1912.]

Carpenter v. Traction Co.

statute to grant a street railway franchise when certain conditions did not exist. The ordinances consequently are invalid.

The ruling in reference to these two ordinances applies also to the ordinances granting the right of the Cincinnati Street Railway Company and the Cincinnati Traction Company to extend the Avondale line to Bond Hill. The change of names of the two streets being invalid, there is no majority of consents of abutting property holders on Reading road to give council jurisdiction to grant street railway franchises, but the vice is even greater in this ordinance than in the two preceding ones. Paragraph B, Section 2 of this ordinance is as follows:

“The grantee herein shall not be required by an authority of the city of Cincinnati or of the state of Ohio or otherwise to extend such line and route beyond the northerly terminus herein fixed in any event, until after the elimination of the grade crossing of the Norfolk & Western Railway Company, and the Baltimore & Ohio Southwestern Railroad Company in said Reading road immediately north of said terminus, and furthermore, the said grantees, their successors and assigns shall be forever exempt from the payment of any part of the cost of the elimination of said grade crossings, and from any expense whatever for the privilege of operating along the roadway, either over or under said railroads, when said grade crossings are eliminated, in the event of the extension of said line beyond the terminus thereof herein fixed.”

This ordinance inhibits the state of Ohio or the city of Cincinnati from ever exercising any power to compel said street railroad companies to extend its route over said railway crossings, and exempts them forever from the payment of any part of the cost of the elimination of said grade crossings, and from any expense whatever for the privilege of operating its road over or under said railroad crossings when the grade crossings have been eliminated.

Is it necessary that I should cite authority showing the fatal defect of *ultra vires* on the part of council in this provision? Section 8892 of the General Code provides for the elimination of railroad crossings and empowers councils when this is done to require street railroad companies to bear a reasonable propor-

tion of the cost thereof, not exceeding one-half of the portion payable by the municipality.

The case of *Railroad v. Defiance* (52 O. S., page 262), reviewed by the United States Supreme Court (167 U. S., page 88), has forever settled the rule that municipalities can no more barter away its power over its streets than its police power. Syllabus 5 of the decision of the Ohio Supreme Court (52 O. S., page 262), states the rule as follows:

5. "The powers conferred on municipal corporations with respect to opening, improving and repairing of their streets and public ways are held in trust for public purposes, and are continuing in their nature, to be exercised from time to time as the public interest may require; and they can not be granted away or relinquished on their exercise suspended or abridged, except when, and to the extent legislative authority is expressly given to do so."

And in the review of this case by the Supreme Court of the United States (167 U. S., page 797), the court says:

"Indeed the general principle that the legislative power of a city may control and improve its streets, and that such power when duly exercised by ordinances, will override any license previously given by which the control of a certain street has been surrendered to any individual or corporation is so well established both by the cases in this court and in the courts of the several states, that a reference to the leading authorities upon the subject is sufficient. Indeed the right of a city to improve its streets by regrading or otherwise is something so essential to its growth and prosperity that the common council can no more denude itself of that control than it can of its power to legislate for the health, safety and morals of its inhabitants."

In a more recent case, the United States Supreme Court, in the case of *The Northern Pacific Railway Co. v. Duluth* (208 U. S., page 583, decided as follows:

"The right to exercise the police power is a continuing one that can not be limited or contracted away by the state or its municipality, nor can it be destroyed by compromise, as it is immaterial upon what consideration the attempted control is based.

"The exercise of the police power in the interest of public health and safety is to be maintained unhampered by contracts

1912.]

Carpenter v. Traction Co.

in private interests and uncompensated obedience to an ordinance passed in its exercise is not violative of property rights protected by the Federal Constitution.”.

*Held:* “That an ordinance of a municipality of a state valid under the law of that state as construed by its highest court, compelling a railroad to repair a viaduct constructed after the opening of the railroad by a city in pursuance of a contract relieving the railroad for a substantial consideration from making any repairs thereon for a term of years was not void under the contract, or the due process clause of the Constitution.”

In the case at bar the ordinance does not even state a consideration for the exemption of the street railway company from its share of the expense of eliminating the railway crossing.

Counsel for the defendants contend that it is sufficient if the court passes on the other questions involved in this case, but that Section 2*b* of the ordinance is not of the essence of the ordinance, and whether legal or not may be severed from Section 1 and Section 2 of the ordinance, and the validity of Section 2*b* determined when a future council sees fit to declare its purpose to build a viaduct. The evidence submitted, both oral and written, shows that this ordinance was the result of an agreement between the Welfare Association of Bond Hill and the Traction Company, the latter only being willing to lay a single track road to the railway crossing, and not to Bond Hill, and this only upon the grant of the exemption by the city authorities from its share of the expense necessary to eliminate the railway crossing when made, and that council adopted this ordinance in this manner.

To test this provision of the ordinance, a separate suit was brought by Mr. Carpenter as a tax-payer under the provision of Sections 4311 and 4314 of the General Code, which provides that the City Solicitor shall apply in the name of the corporation for an injunction to restrain the abuse of corporate power or the execution or performance of any contract made in behalf of the corporation in contravention of any law, and when the solicitor refuses to do so, that a tax-payer may bring such suit. The solicitor refused and Mr. Carpenter brought the suit. Such suit must be brought within one year after council has acted. All the counsel in the case at bar joined in the following entry in this court:

“By consent of all the parties herein named in open court, it is hereby ordered that this case be heard with cause No. 55091 in this court, wherein David L. Carpenter et al are the plaintiffs, and the Cincinnati Traction Company et al are the defendants; that the evidence heard herein shall apply to both causes and that at the determination of said causes in this court, a bill of exceptions in one of said causes shall be deemed and considered a bill of exceptions in both of said causes and may be marked with the number and style of both causes.”

The tax-payer's suit is, therefore, before me for determination, a duty which this court must perform.

The claim is also advanced that if Section 2b of this ordinance is illegal, it may be separated from the entire ordinance, and the latter still upheld, but in the case of *Wellston v. Morgan* (50 O. S., page 147), our Supreme Court considered a case in which the council of Wellston purported to make a contract granting the giving of exclusive rights, and stipulating for lighting streets for 99 years. The court decided that the ordinance was wholly void. The question was raised as to whether only the excess of over ten years might not be lopped off, but at page 156, the court said:

“It is suggested, however, that the ordinance was not absolutely void, but may be treated as good for the term of ten years, since the subject-matter is not *ultra vires*, and inasmuch as 99 years is greater than ten years, must include it, and hence, the contract in that way may be supported. This implies that the purpose of the law is only to prevent the enforcement of contracts made in violation of its terms, and not to prevent the making of such contracts. The language of the statute is that the municipalities referred to shall have power to contract for light for any term not exceeding ten years. This implies, with as much force as if it had been expressly stated, that the municipality shall not have power to contract for any term longer than ten years, and the natural inference is, we think, that the purpose is to inhibit such contracts entirely, for the only certain way of insuring their non-enforcement is to prevent their attempted execution. This may not be effectually accomplished unless they are held to be void; and this is in accord with the general rule which is well expressed by Professor Freeman, in his note to *Robinson v. Mayor* (34 American Decisions, page 625), as it (the municipal corporation) is per-

1912.]

Carpenter v. Traction Co.

mitted to exercise the powers which its charter authorizes, so it is prohibited from exercising those which are not authorized. Any act or attempted exercise of power which transcends the limits expressed or necessarily inferred from the language of the instrument by which its powers are conferred is beyond the authority of a municipal corporation, and is therefore null and void."

In concluding this branch of the case let me cite the case of *Gas Light & Coke Co. v. Columbus* (50 O. S., page 65), reiterating the rule that council has no power to grant any rights whereby it would hamper and embarrass future councils in the exercise of legislative powers.

Syllabus 1. "The power to grade and improve streets is conferred upon municipal authorities for the public benefit. It is a continuing power, and is not exhausted by the first exercise of it; nor can it in the absence of statutory authority be ceded or bargained away; nor can one council by its exercise abridge the capacity of its successors to perform their duty in that behalf, as the public interest may demand."

And on pages 68 and 69 the court says:

"The council is to perform the duty, and it is elementary, we suppose, that the council can not, in the exercise of legislative powers bind its successors unless authority from the state to do so is clearly indicated. The corporation can not abridge its own legislative power.

"It would follow from this that in prescribing regulations or annexing conditions by the city to the exercise by a gas company of a right in a street to enjoy the same for this secondary use, the council has not the authority to cede away nor bargain away the right of the city to perform its public duties, especially as to a primary use of its streets, nor to abridge the capacity of its successors to discharge those duties, unless some express provisions of statute is found to that effect, and that is not claimed."

And, finally, let me ask since when can a municipal council barter away the police power of a state, when even the state can not do so?

Having thus applied the law to the facts as they appear from the evidence, the court finds that the ordinance changing the



Herman v. Albers.

[Vol. 13 (N.S.)]

name of Paddock road to Reading road, and part of Reading road to Reading boulevard are invalid, as well as the ordinance granting a franchise to the Cincinnati Street Railway Company and the Cincinnati Traction Company to continue its Avondale line to a point south of the N. & W. and B. & O. Railway crossings, and that plaintiffs in both suits are entitled to a permanent restraining order prohibiting the defendants from constructing such extension of street railway line in front of their property on Reading road, and such permanent restraining order is herewith granted.

---

**LIABILITY FOR INJURIES ON DEFECTIVE PREMISES  
HELD UNDER LEASE.**

Common Pleas Court of Hamilton County.

CORA HERMAN V. GEORGE H. ALBERS, ADMINISTRATOR.

Decided, 1912.

*Landlord and Tenant—Premises in Defective Condition—Lessee Can Protect Himself Against Defects Only by Covenant—Doctrine of Caveat Emptor Applies—Allegations as to Concealment of Defects.*

1. A lessee who desires to protect himself as to the condition of the premises he is about to lease must bind the lessor by an express covenant as to condition, and this necessity exists regardless of the length of the term of the lease or whether it be oral or in writing.
2. An action against a landlord for injuries to a tenant, due to defective condition of the demised premises, can be based on fraudulent concealment of the defect by the landlord only when there is an allegation of knowledge of the defect on the part of the landlord and of want of knowledge by the tenant and that the defect was concealed by the landlord.

*Cowell & Lamping*, for plaintiff.

*E. S. Morrissey*, for defendant.

GORMAN, J.

Heard on demurrer to amended petition.



1912.]

Herman v. Albers.

The defendant has demurred to the amended petition herein on the ground that the allegations thereof do not constitute a cause of action against the defendant. The amended petition sets out that the defendant is the duly appointed and acting administrator of Clemons A. Haverkamp; that the plaintiff was a tenant of Clemons Haverkamp and resided in two rooms on the third floor of the building known as 406 East Thirteenth street, Cincinnati, of which building Haverkamp was the owner at the times herein mentioned, and rented said rooms to the plaintiff; and that, on or about May 18, 1910, the said Haverkamp was negligent and careless in allowing one of the windows in one of the rooms occupied by the plaintiff to become in such a dangerous condition that said window would not stay up nor raise; that while the plaintiff was standing by said window and while said window was raised, the catch or stop on said window not being sufficient to hold up the same, said window fell on the plaintiff's arm thereby mashing the muscles and bones thereof about four inches above the wrist. Plaintiff further avers that the dangerous condition of said window was unknown to her, but was known to said Clemons A. Haverkamp, and that by reason of such injuries, she suffered damages in the sum of \$2,000. This in substance sets out plaintiff's claim against the defendant as administrator of Haverkamp.

The demurrer, for the purposes of this case, admits all the facts, and it is therefore a question of law whether or not the estate of Haverkamp is liable to the plaintiff upon the facts set out in the amended petition.

The authorities all agree that, as a general rule, there is no obligation on the part of the lessor to see that the premises which he leases are, at the time of the demise, in a condition of fitness for use for the purpose for which the lessee may propose to use them. A lessee, like the purchaser of a thing already in existence, is presumed to take only after examination. The maxim, *caveat emptor*, applies, and if the lessee desires to protect himself as to the condition of the premises, he must exact of the lessor an express covenant, contract or stipulation as to the condition of the premises. This same rule applies whether there be

a lease in writing, or whether it be oral, and whether the term be for years or from month to month. There can be no different rule applicable to a renting from month to month, from that applicable to a lease for years. The relation of landlord and tenant is purely one of contract. In the absence of fraud or an agreement guaranteeing the condition of the premises, there is no liability to the tenant on account of the present or future condition thereof that would not be equally applicable to a similar liability sought to be imposed by the vendee of real estate upon his vendor or grantor. The tenant, therefore, takes the premises as they are, with all their imperfections; he can not assert a right to rescind the lease, or can he avoid the payment of rent, or assert a claim for damages arising from the defective condition of the premises in the absence of an agreement or some fraudulent representation or concealment, which we will note presently. It has been held that the application of this rule extends so far that the lessee can not assert a claim for damages or personal injuries, or injuries to his property on the ground that owing to the condition of the premises at the time of the lease, he, or a member of his family, suffered physical injury by reason of the defective condition of the premises. See *Chadwick v. Woodward*, 13 Abb. (N. Y.), N. Cas., 441; *Foster v. Peyser*, 63 Mass. (9 Cush.), 242; *Gately v. Campbell*, 124 Cal., 520; *Borggard v. Gale*, 205 Ill., 511; *Shackford v. Coffin*, 95 Me., 69, and many other cases that might be cited.

In the case at bar, it is not alleged in the petition that there was any covenant, agreement or contract with reference to the safety, security or sound condition of the premises occupied by the plaintiff. Indeed, plaintiff seeks to recover upon the averment in the petition that the defective condition of the window was known to the lessor, but unknown to her. Now, in order that this knowledge on the part of the lessor and the absence of it on the part of the lessee, or renter, may be made the basis of a claim for personal injuries arising out of the defective condition of the premises, it must appear: first, that there was such a defect in the premises as was not only not known to the renter or lessee, but could not, on a reasonable inspection or ex-

1912.]

Herman v. Albers.

amination, have been ascertained; and furthermore, it must also appear that the defective condition was known to the lessor and unknown to the lessee at the time the lease was entered into, or the renting was made. In other words, the foundation for a claim for damages arising from personal injuries on account of the defective condition of leased premises, in the absence of an agreement, must be based upon a fraudulent concealment of the landlord at the time he rented or leased the premises. Defects which occur in the premises after the leasing or the renting, even though the landlord have knowledge thereof, can not afford a foundation for an action against the landlord, because, in contemplation of law, he is not then the owner of the property, but the lessee or the renter, who occupies the premises, is the owner. All the authorities which I have been able to find hold that, in order to constitute fraud which would furnish the basis for an action against the landlord, in cases of the character set out in the petition, the concealment of the defect by the landlord must have been at the time the lease was made or the renter took possession. A written warranty that the premises are in repair is obviously not broken because they subsequently became out of repairs. *Lyon v. Buerman*, 70 N. J. L., 620.

If this be the rule where there is a warranty as to the condition of the premises, with how much greater force would the rule apply where there is no warranty. The rule that the lessor is under no obligation to the lessee, as regards the condition of the premises at the time of the demise, is subject to one exception, to the effect that, if there is some hidden defect in the premises, or danger thereon which is known to the lessor at the time of making the lease, but which is not apparent to the intending lessee, the lessor is bound to inform the latter thereof, and failing so to do, is liable for injuries to the tenant arising therefrom. See *Finney v. Steele*, 148 Ala., 197; *Holzhauser v. Sheeny*, 31 Ky. L. Rep., 1238; *Rhoades v. Seidel*, 139 Mich., 608, and other cases which might be cited.

If the defects or dangers are such as would be apparent to the lessee on a reasonably careful inspection, there is no obligation upon the lessor to notify him of their existence, even though

they exist and he knows of their existence. *Gallagher v. Button*, 73 Conn., 172; *Borggard v. Gale, supra*; *Cowen v. Sunderland*, 145 Mass., 363; *Cate v. Blodgett*, 70 N. H., 316; *Davidson v. Fischer*, 11 Colo., 583.

The theory on which liability is to be imposed upon the lessor for injuries to the lessee from concealed defects, of which the lessor knows at the time of the lease, has been stated as follows:

“When there are concealed defects, attended with danger to an occupant, and which a careful examination would not discover, known to the lessor, the latter is bound to reveal them in order that the lessee may guard against them.”

While the failure to reveal such defects may not be actual fraud or misrepresentation, it is such negligence as may lay the foundation of an action against the lessor if injury occurs. See *Cowen v. Sunderland, supra*.

Our own Supreme Court, in the case of *Shinkle, W. & K. Co. v. Birney*, 68 Ohio St., 328, has in substance held that the ground upon which a cause of action for damages to the lessee resulting from defective premises, in the absence of an agreement or warranty as to their condition rests, is that there was a fraudulent concealment, and not upon the ground of negligence. In the *Shinkle, Wilson & Kreis Co. case, supra*, the petition averred that the premises, at the time of and before making the contract of lease, were in an unsuitable, insecure and dangerous condition, all of which facts were well known to the defendants (lessors) and unknown to the plaintiff.

Were it not for these averments in this petition, that the condition existed at the time of and before the making of the contract of lease, I am of the opinion that the petition would have been open to demurrer, but because of the presence of this averment, it would seem that the petition was not demurrable. Upon the trial of the case, the court found, as a matter of fact, that neither the lessor nor the lessee knew of the defective or decayed condition at the time of the making of the lease, and upon this state of facts, the Supreme Court held the lessors were not liable.

In the case of *Moore v. Parker*, 63 Kan., 52, it was averred

1912.]

Herman v. Albers.

that at the time of the making of the lease, the premises were defective and known to be so by the lessor, but unknown to the lessee. A demurrer in that case was overruled, and properly so.

In *Tuhm v. Rhodes*, 12 Colo. App., 245, the petition averred that at the time the premises were leased to the plaintiff, they were defective and known to be so to the lessor and unknown to the lessee, and that the lessor concealed the fact. A demurrer to this petition was overruled, and properly so.

In the case of *Coke v. Gutkese*, 80 Ky., 598, it was averred that the landlord at the time of the leasing of the premises, had knowledge of the defective condition of the premises which was unknown to the lessee, and a demurrer in that case was overruled.

In the case at bar, I am of the opinion that in order to sustain an action against the defendant, the petition must aver that at the time the plaintiff rented these rooms, there was a latent defect in the premises, to-wit, in the window, known to the landlord, Haverkamp, and unknown to the plaintiff, and which defect she could not have ascertained upon a reasonable examination of the premises. There is an absence of such averments in the petition, and I am, therefore, clearly of the opinion that the petition is defective and does not state a good cause of action, because of the absence of these averments. The petition is subject to the construction that the defect occurred after the renting, and if it did, even though it was known to the landlord and unknown to the tenant plaintiff, there could be no recovery for the reasons above stated.

The judgment of the court, therefore, is that the demurrer to this amended petition, in the form in which it is now presented, is well taken, and will be sustained.

**AS TO THE OFFENSE OF INTOXICATION.**

Court of Insolvency of Hamilton County.

IN RE BRIDGET FITZSIMMONS.

Decided, June 20, 1912.

*Municipal Corporations—Ordinance for Punishment of Drunkenness Not Valid, When—Section 3664.*

Intoxication is not an offense under the law of Ohio, unless the good order and quiet of the corporation is thereby disturbed.

*W. W. Hester*, for applicant.

*Bernard C. Fox*, contra.

WARNER, J.

The applicant for this writ was convicted and sentenced in the police court of Cincinnati for violation of Section 881 of the codification of ordinances of said city, which makes it "unlawful for any person \* \* \* to appear in public in a state of intoxication or drunkenness."

Section 3664 of the General Code grants to municipalities the power "to provide for the punishment of persons disturbing the good order and quiet of the corporation \* \* \* by intoxication, drunkenness," etc.

An essential part of the offense therefore that the municipality may punish is the "disturbing the good order and quiet of the corporation."

Said ordinance does not follow the statute in this regard and is therefore fatally defective:

"To appear in public" intoxicated is a very different thing from "disturbing the good order and quiet" in a drunken state. An essential part of the offense can not be a matter of inference.

Writ granted.

1912.]

Assignment of Davies.

**QUESTIONS RELATING TO HOMESTEAD EXEMPTION.**

Common Pleas Court of Hamilton County.

**ASSIGNMENT OF W. C. DAVIES.**

Decided, April 24, 1911.

*Homestead Exemption—As to Whether Husband and Wife are "Living Together" Within the Meaning of the Statute—Residence of Husband When His Whereabouts are Unknown—Possession by Wife of a Home Encumbered With Liens—Section 11738.*

1. A court is not precluded from holding that a husband and wife are "living together" within the meaning of the homestead exemption statute, by the fact that following his assignment for the benefit of creditors the husband became unable to support his wife and even his whereabouts are now unknown to her, where she expresses confidence that he will return to her as soon as he is able to provide for her support.
2. It appearing in such a case that the wife is a resident of the state and the husband when last heard from was a resident of the state, a court will assume that he is still a resident of the state.
3. The fact that at the time of the assignment the assignor and his wife were living in a house which belonged to her and was heavily encumbered with liens, and from which they removed and she has since collected rent therefor, is not a bar to an allowance of homestead exemption.

*Ben L. Heidingsfeld, for W. C. Davies.*

*William R. Collins, for assignee.*

*Herron, Gatch & James, for judgment creditors.*

SWING, J.

W. C. Davies made application in the court of insolvency for an allowance of \$500 in lieu of a homestead, under Section 5441, Revised Statutes (Section 11738, General Code). The facts shown by the testimony are as follows:

At the date of the assignment, W. C. Davies, the assignor, was living in the family residence in Pleasant Ridge, Hamilton county, Ohio, the residence being the property of his wife. Davies continued to live in this house and to occupy it as a

homestead until after the sale of the assigned assets by his assignee. Subsequently, but without abandoning the homestead in Pleasant Ridge, having the intention to return, Davies and his wife resided for a time temporarily in Covington, Kentucky, and were living there at the time of the trial in the court of insolvency. Afterwards Mrs. Davies removed to Montpelier, Ohio, where she is now residing, but she still has the intention of returning to Pleasant Ridge and occupying her house there if she can. The house is heavily mortgaged, the mortgage liens and taxes in arrears at the time of the assignment being nearly if not quite the value of the property. Mrs. Davies is now receiving rent for it, it being occupied by a tenant or lessee. Mr. and Mrs. Davies are not now actually living together, but are not separated by any agreement. Mrs. Davies does not know where Mr. Davies is at this time. When she last heard from him he was in Cleveland, Ohio, staying with his mother. All the family furniture has been moved out of the house. Mrs. Davies testified that she expects Mr. Davies to return to her when their financial condition will permit. The testimony showing the facts as here stated is not controverted. The evidence tends to show, I think, that the separation such as it is, is caused by his temporary inability to earn money for the support of himself and his family. There are three questions raised in the case:

First. Whether Mr. and Mrs. Davies are husband and wife living together within the meaning of the statute. The provision of the statute is: "Husband and wife living together, residents of this state \* \* \* and not the owner of a homestead, in lieu thereof may hold exempt," etc.

I am of opinion that under the circumstances Mr. and Mrs. Davies should be held to be husband and wife living together, his absence from her being temporary.

Second. Whether Mr. and Mrs. Davies are residents of the state of Ohio. It is claimed by counsel for the judgment creditors and by the assignee, resisting the allowance, that the burden of proof is upon the assignor to establish his residence in the state of Ohio. I think that the weight of the evidence is that he is a resident of this state. The separation of husband and wife being only temporary, the wife being still in this state and the



1912.]

## Assignment of Davies.

husband having been when last heard from residing in this state, I do not feel able to assume that he is not now a resident.

Third. Whether, it being shown that the husband and wife were at the date of the assignment, occupying the home in Pleasant Ridge, having left it after the assignment, the application since made can be granted.

The general rule as to the right to demand an allowance in lieu of a homestead is stated by our Supreme Court in *Niehaus v. Faul*, 43 O. S., 63, as follows:

“The right to demand an allowance in lieu of a homestead under the Revised Statutes, Section 5441, \* \* \* be determined by the state of facts existing when the fund is finally disposed of by the court.”

But it is claimed that the rule is different in the case of an assignment for the benefit of creditors, and that in such case the applicant must be entitled to the allowance at the date of the assignment. It is said in the case of *Kunkle, Assignee, v. Reeser*, 5 N. P., 401, by Judge Rockel of the Probate Court of Clarke County:

“At the time of an assignment the assignor may be the owner of the following kinds and classes of property:

“First. Personal property only.

“Second. Real estate not occupied as a homestead.

“Third. Real estate occupied as a homestead, but not encumbered by lien so as to preclude the allowance of a homestead therein.

“Fourth. Real estate charged with liens some of which preclude the allowance of the homestead while others do not.

“Fifth. Real estate charged with liens all of which preclude the allowance of a homestead.

“If the property assigned is of the kind mentioned in the first, second and third of the above classes, then the condition of facts existing at the time the assignment is made will control.

“The deed of assignment conveys to the assignee rights at least equal to those acquired by an officer after having made a levy under Section 5483—each for the legal possession of the property; and for very much the same purpose, *i. e.*, to convert it into money and apply it upon the debts of the owner.

“In both cases the law preserves to the debtor the right to claim his homestead exemption, but it must be a right existing

at the time of the levy or the assignment. It can not be created afterwards."

In the 22d Weekly Law Bulletin, page 168, there is an account of the case of *David Moody, assignee for the benefit of creditors of John Whittaker, v. John Whittaker*, decided by our Supreme Court April 19, 1889, without report. From the statement of facts it appears that Whittaker made an assignment April 1, 1884, for the benefit of creditors and on April 23, 1884, he made application to the probate court for an allowance of \$500 in lieu of a homestead, and the court found, "Whittaker was then the owner of a homestead, and dismissed his petition," which judgment of the probate court was subsequently affirmed by the court of common pleas, that court finding: "That Whittaker was not entitled to the allowance asked for."

But later, April 4, 1885:

"After the personal property assigned had been sold by the assignee, Whittaker made another application to the probate court for an allowance of \$500 out of the funds in the hands of his assignee, alleging as a reason therefor that since his first application his homestead had been sold and the proceeds exhausted by mortgage liens."

The probate court found April 6, 1885, that:

"Since the order dismissing Whittaker's first application for an allowance in lieu of homestead, his homestead, which he was then occupying, has been sold to satisfy claims which were at the time of making said assignment liens upon said homestead, and that said homestead has been entirely consumed in the payment of said liens; and that the personal estate of the said assignor has all been converted into money by said assignee, which now remains in his hands for distribution under the order of this court; and the court further finds that said John Whittaker is the head of a family, and that neither he nor his wife is the owner of a homestead, and that he is entitled to \$500 in lieu thereof to be paid to him by the said Moody out of the proceeds of the sale of the personal property of the assignor."

And it was so ordered. This finding and judgment were affirmed by the court of common pleas and later in proceedings in error by the circuit court, and finally by the Supreme Court.

1912.]

Assignment of Davies.

It is said in the published account of the case in the Law Bulletin:

“The decision of the common pleas and of the circuit court was that an insolvent debtor who owns and occupies a homestead at the time of making an assignment for the benefit of his creditors, and consequently is not entitled to an allowance in lieu of a homestead, by the subsequent loss or termination of his homestead, becomes entitled to such allowance out of any funds still in the hands of his assignee. In the Supreme Court the decision of the circuit court was affirmed.”

The brief of counsel for creditors resisting the allowance in that case is published, showing that the contention was clearly made there that the allowance should not be made because:

“At the time the rights of creditors in Whittaker’s property were fixed by the assignment and he was the owner of a homestead.”

It would seem therefore that according to the decision of the court of common pleas and the circuit court and the Supreme Court in the Whittaker case, an allowance may be made in lieu of a homestead in case of an assignment after the date of an assignment, *under some circumstances*, even though the assignor was the owner of a homestead and occupying it at the time of the assignment. It would seem to be implied by the decision of Judge Rockel above quoted, that application may be made for an allowance in lieu of a homestead after the assignment *if the property was encumbered by lien so as to preclude the allowance of a homestead therein.*

In the Davies case there is testimony to the effect that the real estate of the wife *was at the time of the assignment encumbered by a mortgage, I think for \$1,800, and that there were arrears of taxes, and it appears, I think, that the encumbrances were such as to preclude the allowance of a homestead therein,* and the same condition remains at this time.

In view therefore of the fact that the real estate of the wife was at the time of the assignment encumbered by lien so as to preclude the allowance of a homestead, and in view of the decisions of the several courts in the Whittaker case, I am inclined

between two labor organizations, and not between employers and employes. The legal question, however, is the same.

I shall not consider it at great length, nor cite many authorities, as every phase of the question and development of the doctrine find support in the adjudicated cases.

I think it may be said that among courts that uphold the right of injunction in labor disputes, the great weight of authority is in favor at the present time of the proposition that workmen may quit in a body and refuse to work, from motives which are satisfactorily to them, whether reasonable in the eyes of other people or not.

In *Jersey City Printing Company v. Cassidy et al*, 63 N. J. Equity, 759, the syllabus reads as follows:

“1. The right of workmen to combine and to cease their employment in a body is as absolute as the right of an employer to discharge any number of men in his employment.

“2. Union workmen have the right to strike on an employer's refusing to discharge non-union men in his employ.

“3. Employers, where third parties interfere with an employe against the latter's consent and endeavor by threats or persuasion to have the employes under contract to render service break their contract and quit the service, have a right to an injunction to restrain such third persons from so interfering with their employes.

“4. Employers, where third persons interfere with persons willing to be employed, against the latter's consent, by personal molestation, with intent to coerce such persons to refrain from entering such employment, and by personal annoyance, have a right to an injunction to restrain such third persons from so interfering with the persons seeking employment, such interference being an invasion of the right of employers to have labor flow freely to them.”

I quote this syllabus because it is a fair statement of the great body of the law as announced by courts that favor what has been called government by injunction. It announces the right of workmen to cease their employment in a body, if they see fit, and from motives of their own which may not be questioned. It denies the right, by threat or persuasion, to cause employes under contract to break their contracts and quit the service. It also denies the right, by molestation and annoyance, to coerce

1912.]

Graves v. McNulty et al.

others from entering the employment or seeking employment, as well as an invasion of the right of the employers to have labor flow freely to them.

In *Longshore Printing Company v. Howell*, 26 Oregon, 527, the syllabus reads:

“Strikes among workmen are not necessarily unlawful, though they may become both illegal and criminal by the means employed to enforce their objects. Employees may lawfully quit their service, either singly or in a body; but if unlawful means are used to uphold or maintain the strike, or if the end to be attained is unlawful, then the strike itself is unlawful. Under a statute making it a misdemeanor for any one, by force, threats or intimidation, to prevent or endeavor to prevent any employe from continuing his work, the act of the executive committee of the labor union in entering the premises of a person and ordering all members of the union then and there at work to cease from their work under penalty of being dealt with according to the laws and regulations of the union, is not unlawful in the absence of intimidation, threats or violence.”

This case is authority for the proposition that calling out members of a union from work, or men quitting in a body or threatening to quit in a body, is neither the use of force, threats nor intimidation when done peacefully and in an orderly manner. I think it plain, without resorting to the extreme cases which deny the right of injunction in ordinary trade disputes, that this injunction should be so modified as that the defendants, if they do not see fit to work on the same jobs with the plaintiffs, may exercise their free choice of ceasing employment, in the absence of a concession of their demands. If it be said the motive is an evil one, the answer is, that it is an attempt to force the consolidation of labor interests by strengthening organization. This can not be an evil, unless labor unions are unlawful combinations. That such organizations are not unlawful was first decided in 1832, eighty years ago, and it has been followed by a quite uniform line of decisions to the present date.

I think the injunction should be modified as the defendants ask, and the same is accordingly entered.

**PROOF AS TO HABITUAL DRUNKENNESS.**

Common Pleas Court of Ashland County.

HATTIE D. COLLINS v. THOMAS G. COLLINS.

Decided, 1912.

*Divorce—Husband Charged with Habitual Drunkenness—Occasional Lapses Not Sufficient to Establish Such a Charge, Where the Conduct of the Defendant is Otherwise Good—Section 11979.*

A decree of divorce will not be granted against a husband on the ground of habitual drunkenness for three years, where there is proof that he is an industrious man, and desires to live with his wife and provide for their children, and his appearance is not that of one addicted to drink, and there is no proof of his having been intoxicated, except on four occasions, during the last three years.

*W. J. Weirick*, for plaintiff.

*Semple & Sharrick*, contra.

DEVOR, J.

The plaintiff filed her petition in the court for a divorce from the defendant, and a copy of the petition and summons was personally served on defendant, May 16, 1911.

The plaintiff charges the defendant, in her petition, as a ground for divorce, with habitual drunkenness, for three years last past.

The defendant filed his answer June 24, 1911, and denied the charge made against him.

The case was submitted to the court upon the pleadings and evidence, and it appears that plaintiff and defendant were married March 28, 1897, and that four children were born as the issue of this marriage. There are two living, Bessie Collins, aged eleven years, and Florence Collins, aged four years. The other two are dead.

The defendant owns and operates a portable sawmill. He is away in the woods and timber at work while his wife and children are at home. The defendant is industrious and good-na-

1912.]

Collins v. Collins.

tured, but not in full sympathy with his wife's refined tastes and ideals.

The proof shows that the defendant, the night before Christmas, in the year 1907, came home intoxicated, and fell over in a rocking chair and broke the chair and a window pane. Also, a few days before Christmas in 1910, he went to Mansfield, Ohio, to sell Christmas trees, and came home intoxicated, and brought two men with him. They stayed up all night drinking in the house. Also, about Christmas, in 1911, he came home intoxicated, and quarreled with his wife, the plaintiff. Also, in May, 1911, he had a quart of whiskey at home, and invited Bert Sentele to his home and they together drank the quart of whiskey.

The plaintiff testified that during the last year the defendant was worse than the two years previous to the filing of her petition.

The defendant denies that he is an habitual drunkard. He admits that he will take a drink now and then "to sweeten life," and admits that on the dates mentioned by the plaintiff he was intoxicated. The proof fails to show that he ever molested his wife in the least. He says that he loves his wife and children and wants to live with them and provide for them.

The law of Ohio provides that habitual drunkenness for a period of three years a ground for divorce. The law requires three years of habitual drunkenness. This was made a ground for divorce in Ohio, March 1, 1834, and, from that date to this, there is no decision that I can find in Ohio defining what habitual drunkenness for three years means, in actions for divorce.

The case of *Miller v. Gleason*, 18 C. C., 374, was an action for damages for selling intoxicating liquors to her husband. The court defines an habitual drunkard in that case to be a person who had formed the habit and indulged in it, by drinking to excess and becoming intoxicated, whether daily and continuously or periodically, with sober intervals of a greater or less length. "If he had formed the habit of drinking liquor to excess and of becoming intoxicated, he would be an habitual drunkard, whether he was drunk all the time or whether he was drunk periodically with sober intervals of greater or less extent."

The case of *Union Mutual Life Ins. Co. v. Reif*, 36 Ohio St., 596, was an action to recover upon a life insurance policy and in deciding the meaning of "correct and temperate habits" the court say, "An occasional excess in the use of intoxicating liquor does not, it is true, constitute a habit, or make a man intemperate. \* \* \* The habit of using intoxicating liquors to excess is the result of indulging a natural or acquired appetite, by continued use, until it becomes a customary practice. This habit may manifest itself in practice by daily or periodical intoxication or drunkenness."

The case of *Crabtree v. State*, 30 Ohio St., 382, was a criminal prosecution for selling beer and ale to a man in the habit of getting intoxicated and the court say, "Habitual intoxication is by no means a clearly defined condition. As this case does not call for a definition of that condition, we will not attempt to define it with accuracy. When we say a person is in the habit of getting intoxicated, it ordinarily means those times occur about as often as he finds an opportunity to do so. The difficulty of determining whether this habit attaches to a particular person arises mostly from want of a settled standard for comparison."

Then, how shall habitual drunkenness for three years be defined in an action for divorce? Since the days of Noah drunkenness has existed in the world. It has come down to us through the ages and generations of men. It is called an appetite that by frequent indulgence will become a habit, and when it becomes once a habit, and the habit of intoxication continues for three years, it is a ground for a divorce.

I find that the court in the case of *McBee v. McBee*, 22 Or., 329, has collected a large number of opinions on this subject. The opinion reads:

"Bouvier defines an habitual drunkard to be a 'person given to inebriety, or the excessive use of intoxicating drinks, who has lost the power' or will, by frequent indulgence, to control his appetite for it.' Habitual drunkenness,' said Harrison, J., 'or the degree or the course of intemperance that amount to it,' can not be exactly defined. We may, however, say, in general terms, that one is addicted to habitual drunkenness who has a fixed habit of frequently getting drunk, and he may so addicted,



1912.]

Collins v. Collins.

though he may not oftener be drunk than sober, and he may be sober for weeks. *Brown v. Brown*, 38 Ark., 328.

“ ‘Occasional acts of drunkenness do not make one an habitual drunkard. Nor is it necessary that he should be continually in an intoxicated state. A man may be an habitual drunkard and yet be sober for days and weeks together. The rule is, has he a fixed habit of drunkenness?’ (*Ludwig v. Commonwealth*, 18 Pa. St., 172). ‘He is an habitual drunkard,’ says the court in *Commonwealth v. Whitney*, 71 Mass. (5 Gray), 85, ‘whose habit is to get drunk; whose inebriety has become habitual.’ Poland, J., said: ‘The fair definition of habitual drunkard, as used in the statute, we suppose to be, one who is in the habit of getting drunk, or who commonly or frequently is drunk; and we do not suppose it necessary, to satisfy those terms, that a man should be constantly or universally drunk (*State v. Pratt*, 34 Vt., 323). It is held in *Magahay v. Magahay*, 35 Mich., 210, that one who has the habit of indulging in intoxicating liquors so firmly fixed that he becomes intoxicated as often as the temptation is presented by his being in the vicinity where liquor is sold, is an habitual drunkard within the meaning of the divorce law. In *Walton v. Walton*, 34 Kan., 195, it is said that a man who drinks to excess may be an habitual drunkard within the meaning of the divorce laws, although there are intervals when he refrains entirely from the use of intoxicating drinks. ‘But,’ the court adds, ‘before he can be regarded as an habitual drunkard, it must appear that he drinks to excess so frequently as to become a fixed practice or habit within him.’ In *Murphy v. People*, 90 Ill., 59, it was held that a person who is in the habit of getting intoxicated is one who has the involuntary tendency to become intoxicated, which is acquired by frequent repetition. ‘The charge of habitual intemperance,’ says Harrison, J., ‘evidently can only refer to a persistent habit of becoming intoxicated from the use of strong drinks, thus rendering his presence in the marital relation disgusting and intolerable’ (*Burns v. Burns*, 13 Fla., 376). And, Watkins J., defined it thus: ‘It means the custom or habit of getting drunk; the constant indulgence in such stimulants as wine, brandy, and whiskey, whereby intoxication is produced: not the ordinary use, but the habitual abuse of them. The habit should be actual or confirmed. It may be intermittent. It need not be continuous, or even of daily occurrence. *Mack v. Handu*, 39 La. Ann., 497.

“From these definitions, there must be frequent and regular recurrence of excessive indulgence in intoxicating drinks to constitute an habitual drunkard. It is not necessary that he should drink liquors to excess, and become intoxicated every day, or

even every week, but there must be such frequent repetition of excessive indulgence as to engender a fixed habit of drunkenness. Occasional acts of intoxication are not sufficient to make one an habitual drunkard; there must be the involuntary tendency to become intoxicated as often as the temptation is presented, which comes from a fixed habit acquired from frequent and excessive indulgence. The man is reduced to that pitiable condition in which he either makes no vigorous effort to resist and overcome the habit, or his will has become so enfeebled by the indulgence that resistance is impossible.' There is generated in him, by frequent and excessive indulgence, a fixed habit of drunkenness which he is liable to exhibit at any time when the opportunity is afforded. He is an habitual drunkard because he is commonly or frequently in the habit of getting drunk, although he may not always be so. When a man has reached such a state of demoralization that his inebriety has become habitual, its effect upon his character and conduct is to disqualify him from properly attending to his business, and if he be married, to render his presence in the marriage relation disgusting and intolerable, especially if he be an 'habitual gross drunkard,' as declared by our statutes. 'The reason why the law makes habitual drunkenness a ground for divorce is not alone because it disqualifies the husband or wife from attending to business, but in part, if not mainly, because it renders the person addicted thereto unfit for the duties of the marital relation, and disqualifies such person from properly rearing and caring for the children born of the marriage.' *Richards v. Richards*, 19 Brad., 469."

The defendant in this case is anxious to care for his two small children, and desires to live with his wife and family. He will do more for his children than an entire stranger, and a court should be very reluctant in granting a divorce where there are small children.

Quoting from the opinion of the court in the case of *Shutt v. Shutt*, 71 Md., 193:

"In this state it has been repeatedly declared that the marriage relation is not to be disturbed for any but the gravest reasons, and only upon such state of facts as show to the entire satisfaction of the court that it is impossible that the duties of the married life can be discharged. Public policy and morality alike condemn these judicial separations of husband and wife, except where it can not be avoided."

1912.]

In re Zacharow.

So, the court finds, in this case, that the defendant is not an habitual drunkard, and never has been. His appearance does not indicate it, and the evidence wholly fails to establish this fact.

The petition for divorce is dismissed, and the defendant is ordered to pay five dollars a week for the support of his two children until such time as he and his wife can agree and live together.

By the law of Ohio he is the head of the family and is entitled to the custody of his children.

---

### TRIAL BEFORE A MAGISTRATE WITHOUT A JURY.

Court of Insolvency of Hamilton County.

IN RE ISADORE ZACHAROW.

Decided, June 20, 1912.

*Criminal Law—Trial Before a Police Court or Magistrate—Jurisdiction to Try Without Jury Depends on Waiver in Writing—Section 13511.*

Under the law of Ohio a magistrate or police judge is without jurisdiction to try, without a jury, one charged with an offense for which imprisonment can be imposed, unless a jury has been waived in writing.

*Gusweiler & Klein and Jas. J. McCartin, for applicant.  
Bernard C. Fox, contra.*

WARNER, J.

The applicant was charged with a misdemeanor under Section 13031, General Code, and was tried in the police court of Cincinnati and sentenced to the work house. It is admitted that a jury was not had in the case, and that there was no waiver of a jury in writing. It is claimed on behalf of the applicant that under these facts the police court had no jurisdiction to impose any sentence upon him.

The jurisdiction of the police court in misdemeanors under the laws of the state is the same as that conferred upon justices of the peace. Section 4577, General Code.

Where a person is charged with some misdemeanor under a statute of the state and is taken before a magistrate, Section 13511, General Code, provides that if "the accused in a writing subscribed by him and filed before or during the examination, waive a jury and submit to be tried by the magistrate, he may render final judgment."

It is clear under the law of this state that where imprisonment may be imposed as a part of the penalty upon a person found guilty of some offense, that a jury trial must be had unless duly waived according to law. In the case at bar the police judge was the magistrate before whom the applicant was brought. A jury was not waived in writing according to the plain provisions of said Section 13511, which alone could give said magistrate power and authority to impose the sentence given. He was entirely and absolutely without jurisdiction to pass judgment in the case.

It appears that after the writ in this case had been sued out, and the applicant released on bond to appear herein, he prosecuted proceedings in error to said police court in the common pleas court of this county.

This does not affect the status of the case at bar, nor deprive the applicant of a hearing upon the merits of this writ as the facts existed when the writ was sued out.

Writ allowed.

1912.]

State v. Bloomfield.

**CONSTITUTIONALITY OF THE DEAN LAW.**

Common Pleas Court of Stark County.

STATE OF OHIO V. BENTON J. BLOOMFIELD. \*

Decided, 1911.

*Constitutional Law—Answers Required by the Dean Character Law—  
Not in Contravention of Constitutional Rights—Inhibition Against  
Licensing the Sale of Liquor not Violated—Equal Protection of the  
Laws—Privileges and Immunities—Sections 6083 and 13219.*

1. The answers required under the Dean law from one engaged in the sale of intoxicating liquor, do not bring said law into conflict with Article V of the Constitution of the United States, or of Section 10 of the Bill of Rights of the Ohio Constitution because of possible incrimination of the person answering.
2. Nor is this law in contravention of the constitutional provision against licensing the traffic in intoxicating liquors.
3. Nor does said law violate Sections 1 and 2 of the Bill of Rights of the Ohio Constitution or the Fourteenth Amendment of the Federal Constitution.

DAY, J.

In this case a motion in arrest of judgment has been filed which attacks the constitutionality of the law under which the indictment is found, the statute in question being commonly called the Dean law.

The record discloses that the defendant, Benton J. Bloomfield, was indicted by the grand jury of the January, 1911, term of this court for the offense of making false answers to the assessor under said law. A demurrer was interposed to the indictment which was heretofore overruled, and to which the defendant excepted. A plea of "not guilty" was entered and the case proceeded to trial, a jury being impaneled and a verdict of guilty was rendered. Whereupon the defendant filed

---

\*Affirmed by the Circuit Court without opinion; Circuit Court affirmed by the Supreme Court, June 27, 1912, *Bloomfield v. State*, 86 Ohio State, p. —.

this motion in arrest of judgment and attacks the law in question upon three grounds:

*First. That answers made under the statute might tend to criminate the person answering.*

The act in question requires that certain questions be answered by one who has engaged in the liquor business, and it is contended that the answers to these questions required by the Dean law might tend to criminate one making such answers, this being in violation of Article V of the United States Constitution and Section 10 of the Bill of Rights of the State Constitution. The language in question being practically identical is as follows:

“Nor shall a person be compelled in any criminal case to be a witness against himself.”

It will be noted that the constitutional protection extends to “any criminal case,” and does not reach a situation here presented, where the answers given are not in “a criminal case.” But further than that, the language of both the state and federal Constitutions is “compelled” to be a witness. Clearly, no man is compelled to answer the questions propounded under the Dean law, as he is not compelled to go into the liquor business. It is optional with him, and if he does conclude to follow such work it is voluntary and of his own accord. It follows that the questions answered under the Dean law are, therefore, voluntarily answered, and he is not compelled to incriminate himself unless he chooses or does so voluntarily. His constitutional rights can not, therefore, be said to be violated in that regard, as he has not been *compelled* to do anything.

*Second. That act operates as granting a license to traffic in intoxicating liquor.*

The chief contention of counsel at the argument of this motion was, that the act under consideration operated as a license and was therefore contrary to the constitutional provisions of this state and the decisions of our Supreme Court. A very able argument is made in behalf of this contention, it being urged that

1912.]

State v. Bloomfield.

the act comes within the inhibition of the Constitution which reads that—

“No license to traffic in intoxicating liquors shall hereafter be granted in this state, but the General Assembly may, by law, provide against evils resulting therefrom.”

This question has received frequent attention from the Supreme Court of this state, and a brief resume of the cases bearing upon this question are as follows:

*State v. Hipp*, 38 O. S., 199, providing that one must give bond to pay the tax and providing of penalty for failure so to do. Opinion of Okey, J. Johnson, J., dissenting.

*State v. Frame*, 39 O. S., 399: Scott law held constitutional. Providing for a tax lien upon real estate in which such business is conducted. Opinion by McIlvaine, J. Okey dissenting.

*State v. Sinks*, 42 O. S., 345: *Held*: Scott law amended unconstitutional in so far as it provided for a lien on real estate occupied by a tenant dealing in liquor, and reversing *State v. Frame*. Opinion per curiam. Okey, Owen and Follett, JJ., concurring. Johnson and McIlvaine dissenting.

*King v. Cappellar*, 42 O. S., 218: Had under consideration the Scott law, but did not pass definitely upon its unconstitutionality in all respects. Opinion by Follett, J. Johnson and McIlvaine concur in affirming judgment on the ground that the act in question is constitutional. On the point made by the majority for uniting in affirming the judgment they express no opinion.

*Butzman v. Whitbeck*, 42 O. S., 223: Follows and approves *State v. Hipp*, 38 O. S., 223. Follows and approves *State v. Hipp*, 38 O. S., 199, holding Scott law unconstitutional so far as it provided for a lien on real estate occupied by a tenant who is a dealer in liquors, and in effect a license law and therefore unconstitutional. Whether the act in other respects is unconstitutional was not decided. Opinion by Owen, J. Johnson and McIlvaine dissenting.

*Adler v. Witbeck*, 44 O. S., 347: Dow law declared constitutional and holds that the tax and penalties imposed for refusal

to sign and verify statement to assessors does not make the law unconstitutional and a license law.

*Anderson v. Brewster*, 44 O. S., 476, holds Dow law, so far as it provides an assessment or tax upon business of trafficking in liquors not in effect a license law. Opinion by Dickenson, J. Owen and Follett, JJ., dissenting.

The effect of these two latter seem to reverse *State v. Sinks* in so far as that case reverses *State v. Frame*.

From an examination of these somewhat conflicting opinions and in the light of the latter two cases especially, our Supreme Court seems to have come to a view which recognizes a clear distinction between a license and a tax, and that in so far as an act is regulatory in its nature and is an exercise of the police power of the Legislature over the traffic in intoxicating liquors, such acts are constitutional and not within the inhibition above quoted.

There is doubtless much room for argument concerning the expression of the various judges constituting the court from *State v. Hipp*, 38 O. S., 199, to *Anderson v. Brewster*, 44 O. S., 576, but upon no other theory can I reconcile their opinions than the one which I have stated above.

However, in my opinion, the question of the constitutionality of the act in question has been directly passed upon by the Supreme Court of this state in this case of *Hayner v. State*, 83 O. S., page 178. On page 197 the court gives attention and construction to the following language used by the counsel for plaintiff in error, Haynor, in his brief:

“The *whole statute* is probably *unconstitutional* \* \* \* the first part as being definitely a license law within our decisions, and fourth section as being a general law not of uniform operation.”

Now, Judge Spear on page 197, after quoting the above language, says:

“It seems to us that it can not be necessary at this late day to enter into a discussion as to whether our liquor taxing laws are license laws. The ground has been fully plowed and har-



1912.]

State v. Bloomfield.

rowed in many previous decisions; and section four does operate uniformly within the meaning given that requirement of the Constitution as to general laws, because the operation of the statute is the same in all parts of the state where the same circumstances and conditions exist. An act is not required to be of universal operation in order to be of uniform operation. To sustain this objection would be to overrule all the decisions of this court relating to local option. We regard the policy of the state in that respect as established by those decisions and are not disposed at this late day to disturb it."

It seems to me that the language used by Judge Spear must be taken to mean what it says, to-wit, "that there is no question as to whether our liquor taxing laws are license laws or not," and a study of the many decisions rendered by that able and learned judge must certainly bring one to the conclusion that he never leaves in doubt the position of the court on a proposition of law enunciated in an opinion delivered by him.

In concluding this feature of the contention offered by the learned counsel for the defendant I call attention to the following principle:

That a license is of the nature of a privilege, and it will be a strange incongruity to grant one the privilege of bearing the burden of a tax. A tax which may be resorted to for the purpose of restraining what is opposed to the public interests, would hardly be called a license to do that which is sought to be restrained. The two things are entirely distinct in their characteristics. A license may exist without the imposition of a tax but a tax may be imposed without the granting of a license.

Third. *That the act is in violation of State and Federal Constitutions.*

The third ground of attack, and to my mind the most plausible, is the claimed violation of Sections 1 and 2 of the Bill of Rights of the Ohio Constitution, and the Fourteenth Amendment of the Federal Constitution. These provisions are, in substance, "that all men have certain inalienable rights, among which are those of enjoying and of defending life and liberty, acquiring, possessing and protecting property." The second

section, among other things, recites "that the government is instituted for their (people) equal protection and benefit."

The Fourteenth Amendment recites, "No state shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the full protection of the law."

No one of the questions propounded under the Dean law is, "are you, or if a firm, is any member of your firm, an alien or an unnaturalized resident of the United States"? It is therefore claimed that this law is unconstitutional because an alien or an unnaturalized resident of the United States may not enjoy equal privileges with the citizens of the United States.

There is nothing in this record to disclose that this defendant is either an alien or unnaturalized resident of the United States, and that he is thereby injured in any of his substantial rights or constitutional privileges so far as he himself is concerned. It is a principle of constitutional law that only those who are prejudiced by an unconstitutional act can be heard to make objection to it. The courts will not listen to an objection made to the constitutionality of an act by a party whose rights it does not effect and who, therefore, has no interest in defeating it.

It is firmly settled that a party will not be heard by a court to question the validity of a law, or any part thereof, unless he shows that some right of his is impaired or prejudiced thereby. *Cooley's Constitutional Limitations*, page 232; *Law of Intoxicating Liquors*, Woolen & Thornton, Section 186, pages 279 and 280, and cases cited.

I recognize however the right of the defendant to raise the question if the parts of the law which affect him are so inseparably connected with the parts which do not affect him claimed to be unconstitutional as to make a complete structure that must either stand or fall as a whole.

Be that, however, as it may, in view of the fact that the question here presented and ably argued in the claimed violation of

1912.]

State v. Bloomfield.

the Fourteenth Amendment and Ohio Constitution, it is entirely proper to discuss the defendant's rights thereunder.

First. It is strongly urged that this act is in violation of the Fourteenth Amendment of the United States Constitution. It should be noted at the outset that there is a marked and clear distinction between the words "equal protection of the laws" and "equal privileges and immunities." This distinction is apparent on the face of the article and was undoubtedly put there for the specific purpose of making a distinction. "Equal protection of the law" applies to all persons; while the expression "privileges and immunities" applies to the citizens of the United States. Now, with this distinction clearly in mind as applicable to the case at bar, and in construing the various decisions relative to the Fourteenth Amendment, it is apparent that the law under consideration does not deprive any one of a constitutional right which is guaranteed. The act of depriving an alien or unnaturalized person of the right to carry on the traffic does not come within any classification under the article. It would clearly come within the term "privileges and immunities." Now, "privileges and immunities" are vouchsafed to citizens, but on the other hand, all persons are entitled to the equal protection of the laws. This law in letter and spirit is for the purpose of protecting society and the public from the evil effects resulting from the trafficking in intoxicating liquors, and it equally protects the alien from the evils as well as any other. He can not complain because he is not permitted to cause the evils sought to be prevented. This Fourteenth Amendment has frequently and repeatedly been invoked in questions arising under the validity of license through laws regulating the sale and control of intoxicating liquors, but almost universally without avail. This is true of that part of the amendment concerning the abridgment of privileges and immunities of citizens of the United States. The right to sell intoxicating liquors is not one of such privileges and immunities. *Jordan v. Evansville*, 163 Indiana, 512.

The language of Chief Justice Fuller in *Geoizza v. Tirna*, 148 U. S., 657, is particularly in point:

“Privileges and immunities of citizens of the United States are privileges and immunities arising out of the natural and essential character of the national government and granted or secured by the Constitution of the United States, and the right to sell intoxicating liquor is not one of the rights growing out of such citizenship.”

*Barkmyer v. Iowa*, 18th Wallace, 29:

“The Fourteenth Amendment does not take from the states their powers of police that were reserved at the time the original constitution was adopted. Undoubtedly it forbids any arbitrary deprivation of life, liberty and property and secures equal protection to all under like circumstances in the enjoyment of their rights. But it was not designed to interfere with the power of the state to protect the lives, liberty and property of its citizens, and to promote their health, morals, education and good order.”

Again, Mr. Justice Fields in *Crowley v. Christianson*, 137 United States, page 86, says:

“There is no inherent right in a citizen to sell intoxicating liquors by retail. It is not a privilege of a citizen of the United States. The manner and extent of regulation rests in the discretion of the governing authorities. It is a matter of legislative will only.”

Attention is also called to *Mugler v. Kansas*, 123 U. S., 623; 26 Federal Reporter, 289; 42 South Carolina, 222; 10 Missouri, 591; 18 Nebraska, 323; 26 Connecticut, 179.

This question of the application of the Fourteenth Amendment, matters concerning which the state seeks to regulate by virtue of its police power, has received many judicial interpretations. Attention is called to the language of Mr. Justice Field, in the 100 United States, page 367:

“The equality of protection intended does not require that all persons shall be permitted to participate in the government of the state and the administration of its laws, to hold its offices, or be clothed with any public trusts. All persons within the jurisdiction of the state, whether permanent residents or temporary sojourners, whether old or young, male or female, are to be equally protected, yet no one will contend that equal protec-

1912.]

State v. Bloomfield.

tion to men, to women, to children, to aged, to aliens, can only be secured by allowing persons of the class to which they belong to act as jurors in cases affecting their interests.”

Again, by the same justice in the 113 United States, 709:

“However broad the right of every one to follow such calling and employ his time as he may judge most conducive to his interests, it must be exercised subject to such general rules as are adopted by society for common welfare. All sorts of restrictions are imposed upon the actions of man notwithstanding the liberty which is guaranteed to him. It is liberty regulated by just and impartial laws.”

The right to enact laws in the nature of police regulations for the control and regulating of the liquor traffic has long been recognized by the federal courts, and the act under discussion involving the right of the state to exercise such police power can not be said to infringe any right guaranteed by the Federal Constitution.

The cases cited by counsel in the very able prepared brief and relied on to support the theory of unconstitutionality recently advanced, seem to my mind to depend for their strength upon a denial of “equal protection of the law,” and not upon failure to secure equal privileges and immunities. I can not see that the cases cited considered in the light of that distinction have the force claimed.

Second. In regard to the Ohio cases cited by counsel upon the constitutionality of the act in question, the underlying principle of all the cases cited is, that there is a discrimination against some person, or a class of persons, which denies them an equal protection of the law, or that there is an unequal operation of the law throughout the state. Clearly this discrimination can not be said to affect the rights of those who wish to sell intoxicating liquor, as all persons are admitted upon the same plane. It is true that certain persons are not admitted, but those who are treated uniformly, both as to place and as to protection and privilege and immunity. The Legislature has simply exercised its power in regulating the sale of intoxicating liquors so that all persons who desire to sell may come within

the class and shall receive equal treatment and equal privilege, but it also says to certain other persons "that in the regulating of the sale of intoxicating liquors you may not sell." Therefore the regulating of the sale of intoxicating liquors, those within the class who sell, have lost no privilege and are not discriminated against, and those that are without that class have lost no constitutional privilege or immunity and are still entitled to the equal protection of the law; and the law is uniform in its operation, but they are not permitted to enter the class by virtue of the right of the Legislature to regulate the sale of intoxicating liquor, a clear and undoubted right of the exercise of police power by the Legislature which is constitutional under both the federal and state constitutions.

This principle is recognized by the Supreme Court of this state in declaring the Rose Law constitutional. In the case of *State v. Walder*, 10th Ohio Nisi Prius, 497, it was held:

"Prohibition of the sale of malt liquor without reference to its intoxicating quality is within the police power of the state.

"The sale of malt liquor for use as a beverage is within the inhibition of the Rose County Local Option Law, and it is no defense to a prosecution for violation of this law that the beverages sold were not intoxicating."

Now, it is contended in this case that by specifying certain kinds of liquor that might or might not be sold, the constitutional rights of the defendant were violated under the Fourteenth Amendment by the law regulating and prohibiting the sale of certain kinds of liquor. On page 503 the court said:

"It is sufficient to say that the unopposed current of judicial opinion as expressed by the highest courts of many states is that the Legislature has the power to define what sort of liquors shall be deemed intoxicating for the purpose of administering laws to restrain evils flowing from the use of intoxicating drinks."

Now, this case of *State v. Walder* was passed upon by the Supreme Court in the 83 O. S., page 68, and the judgment of the court of common pleas was affirmed. The language of Judge Killitts in rendering the common pleas court decision may be ac-

1912.]

State v. Bloomfield.

cepted as having received the approval of the Supreme Court. If, therefore, the Legislature has the power to define what sorts of liquors shall be deemed intoxicating for the purpose of administering laws to restrain the evils flowing from the use of intoxicating drinks, it may with equal force be said to have the power to prescribe what persons may engage in the business of selling intoxicating liquors and what persons may not. It would equally be an invasion of constitutional rights to say that by the police power the Legislature may declare certain liquors to be intoxicating and to regulate their sale, and to say that certain persons may not enjoy the privileges of such sale. One is as much an unconstitutional provision as the other.

The principle of the right of the Legislature to regulate the liquor traffic, it seems to me has been passed upon by our Supreme Court in construing the act to regulate the practice of medicine in the state of Ohio. Of course, I recognize that there is no constitutional provision as to licensing in the medical profession, but the invasion of the personal rights, privileges and immunities and equal protection of the law is the same. The third syllabus in the case of *France v. The State*, 57 O. S., page 1, reads as follows:

“It is competent for the state under its power to provide for the welfare of its people, to establish needful regulations, and impose reasonable conditions, calculated to ensure proper qualifications, both with respect to learning and moral integrity of persons desiring to engage in the practice of medicine in the state, and require compliance therewith by such persons before they shall be permitted to practice within the state.

“The regulations adopted by the statute are of a character that do not infringe upon the privileges and immunities granted by Section 2, Article IV of the Federal Constitution to citizens of the several states, nor abridge those secured to citizens of the United States by the Fourteenth Article of Amendment of that Constitution.”

Now, it is conceded that the Legislature by the Constitution has been given the power to provide against the evils resulting from traffic in intoxicating liquors; and if we should substitute in the third syllabus above quoted the words “liquor traffic” or

“saloon,” the force and effect of the application of the principle involved will be the more apparent. It would then read:

“It is competent for the state under its power to provide for the welfare of its people to establish needful regulations and impose reasonable conditions calculated to ensure proper qualifications both with respect to honesty and moral integrity of persons desiring to engage in the business of trafficking in intoxicating liquor in the state, and require compliance therewith by such persons before they shall be permitted to engage in such business within the state.

“The regulations adopted by this statute are of that character that do not infringe upon the privileges and immunities granted by Section 2 of Article IV of the Federal Constitution to citizens of the several states, nor abridge those secured to citizens of the United States by the Fourteenth Article of Amendment, of that Constitution.”

Clearly if the Legislature had the right to regulate the practice of medicine, by excluding certain persons as not having the necessary qualifications to practice, by the same reasoning it would equally have the power to exclude persons whom it should not regard as qualified to engage in the liquor business. If the exercise of this power in one profession or business is constitutional, in the interests of the welfare of the people, it is equally so in the other. Illustrations of this right to regulate might be multiplied, but the above suffices to sustain the principle.

Taking this view of the three questions presented, I am of the opinion that the motion in arrest of judgment should be overruled, and exceptions preserved to the defendant.



1912.]

Shields v. Traction Company.

**DEFENSES IN ACTION IN TORT.**

Common Pleas Court of Hamilton County.

**VICTOR SHIELDS V. THE CINCINNATI TRACTION COMPANY.**

Decided, November 3, 1911.

*Pleading—Property Damaged by Negligence—Owner Indemnified by Way of Insurance—May Still Proceed Against the Party Causing the Injury, When—Defenses—Actions Which Are Assignable.*

1. The fact that an owner of property damaged by negligence has received indemnity therefor by way of insurance, can not be pleaded as a defense in an action by the owner against the party causing the damage.
2. But where the petition of the owner for damages for injuries to personal property sets up a cause of action which sounds in tort, a cause is alleged which would survive and is assignable, and an averment in the answer that said cause has been assigned by the plaintiff to some person or corporation to the defendant unknown, and he has by that act ceased to be a party in interest, constitutes a defense which can not be destroyed by a motion to strike out.

*Theodore C. Jung and Henry E. Beebe, for the motion.*

*Rufus B. Smith, contra.*

**BROMWELL, J.**

Decision on motion of plaintiff to strike out the third defense in defendant's answer to amended petition.

The amended petition in this case alleges that the defendant was guilty of negligence in permitting one of its cars to collide with and injure an automobile belonging to plaintiff and asks for damages. To this amended petition the defendant has set up three defenses of which the third is as follows:

“For a third defense defendant says that it is informed and believes, and on such information and belief avers that said plaintiff at the time of said collision was insured against injury or damage to said automobile and has been reimbursed or indemnified for any damage or injury occasioned to said automobile in said collision by the company, corporation or person so insuring said automobile, who are to this defendant unknown, and that said plaintiff assigned or transferred the claim and cause of action herein asserted and made to said corporation, company or person, and is not the real party in interest herein.”

While the motion is directed to this entire third defense I shall regard the defense as setting up two entirely distinct claims; the first being that the plaintiff was fully insured against the loss sustained, and the other that the plaintiff made an assignment of his cause of action and that he is no longer the real party in interest.

The first question to be considered is whether the fact that an indemnity company has settled for the loss in any way mitigates the damages recoverable against the person whose negligence caused the injury, or in any way affects the right of the insured to proceed against the wrongdoer without reference to any settlement made by him with an insurer.

*Sutherland on Damages*, paragraph 158, states the law very clearly in the following words:

“Generally there can be no abatement of damages on the principle of partial compensation received for an injury where it comes from a collateral source wholly independent of the defendant and is as to him *res inter alios acta*. \* \* \* A man who was working for a salary was injured by the negligence of the carrier; the fact that the employer did not stop the salary of the injured party during the time he was disabled was held not available to the defendant sued for such injury in mitigation. nor does the gratuitous care and nursing of an injured plaintiff relieve the party who caused the injury from liability for their worth. Nor will proof of money paid to the injured party by an insurer or other third person by reason of the loss or injury be admissible to reduce damages in favor of the party by whose fault such injury was done. The payment of such moneys not being procured by the defendant and they not having been either paid or received to satisfy in whole or in part his liability, he can derive no advantage therefrom in mitigation of damages for which he is liable. As has been said by another, to permit a reduction of damages on such a ground would be to allow the wrongdoer to pay nothing and take all the benefit of a policy of insurance without paying the premium.”

8 *Am. & Eng. Encyc. of Law*, 2d Ed., page 690, refers to this same principle in the following language:

“As a general rule, the damages to which a plaintiff is entitled for injuries to person or property can not be reduced by amounts received upon policies of insurance as indemnity for the injuries.”

1912.]

Shields v. Traction Company.

The following are some of the decisions of courts in the various states upon the subject, the syllabus alone being cited:

*Missouri, K. & T. Ry. Co. v. Rains*, 40 S. W. Rep., 635:

Syl. 2. "Money received on an accident policy by one injured does not affect the amount of the recovery of the one whose negligence caused the injury."

*Harding v. Townshend*, 43 Vt., page 536:

Syl. "A town liable for damages occasioned by the insufficiency of a highway is not entitled to have deducted the amount received by the plaintiff from an insurance company on account of the injuries for which he claims to recover against the town."

*Lindsay, v. Bridgewater Gas Co.*, 14 Pa. County Court Reports, page 181:

Syl. "A person whose property has been destroyed by fire caused by the negligent act of another, may recover damages from the wrongdoer notwithstanding he has received from an insurance company the full amount of his loss."

See also, *Althorf, Admr., v. Wolfe*, 22 N. Y., 355, and *Briggs v. Railroad Co.*, 72 N. Y., 26.

*Christian Weber v. Railroad Co.*, 36 N. J. Law, 213:

Syl. 1. "A person having his house and furniture burned from the carelessness of agents of a railroad company, is entitled to recover the entire amount of his loss, in a suit against such company, notwithstanding he has been paid by an insurance company the sum for which they were insured."

*Dillion v. Hunt*, 105 Mo., 154:

Syl. 3. "Where an owner of a burned building, in taking down its walls, injures the goods in the store of an adjacent proprietor, the damage of the latter will not be diminished by the amount of insurance money received by him for the injury of the goods."

*Allen v. Barrett*, 100 Iowa, 16:

Syl. 1. "The defendant in an action to recover damages for the negligent burning of a building can not claim a reduction of damages in the amount paid to plaintiff by an insurance company, especially where plaintiff had agreed to reimburse the insurance company if he recovered of defendant."

*Railroad Co. v. Griffin*, 8 Ind. App., page 47:

Syl. 3. "Where by the actionable negligence of a railroad

company, fire escapes from its right of way to adjoining property, which is thereby consumed, the owner of such property can recover his entire loss from such company without regard to the amount of insurance that may have been paid to him thereon."

*Cunningham v. Railroad Co.*, 102 Ind., 478:

Syl. 1. "Where, by the actionable negligence of a railroad company, fire from its locomotive is communicated to adjoining property which is thereby consumed, the owner of such property can recover his entire loss from such company without regard to any insurance thereon."

Syl. 2. "In such case the fact that such property at the time of its destruction was insured, and that the insurance companies had paid the owner the amount of the insurance, is not available to the railroad company as a defense."

The above citations of authorities would seem to show clearly the immateriality of the allegation in the third defense relating to the insurance and indemnity alleged to have been paid to the plaintiff, and so much of the said defense should be stricken out.

As to the question as to whether the remaining portion of the defense, namely, the assignment by plaintiff of his claim and cause of action against the defendant is proper and should be allowed to remain in the answer, I think it should be answered in the affirmative for the reason that the petition setting up a cause of action sounding in tort for injury to property presents a cause of action which would survive and is therefore assignable. This is clearly stated in *Sutherland on Damages*, paragraph 7:

"When a cause of action arises it has a legal value as a chose in action; it is a species of property. The right to damages vests when the act or neglect out of which it arises occurs. \* \*

\* Except when the right of action and to damages is for a personal tort or breach of a marriage promise, it survives the death of the injured party and is assignable."

So much, therefore, of the third defense as alleges an assignment by plaintiff of his entire claim against the defendant, and that the plaintiff is not the real party in interest is, I think, a proper defense and as to this allegation, the motion is overruled. Leave to amend if defendant desires to do so.

1912.]

Hirsch v. Hunt.

**INTERFERENCE WITH BUSINESS BY POLICE.**

Superior Court of Cincinnati.

ADOLPH HIRSCH v. HENRY T. HUNT, MAYOR, ET AL.

Decided, September 3, 1912.

*Injunction—Against Interference with Business by Police—Not Available to One Who May be Concealing Illegal Transactions—Doubts of a Chancellor will be Resolved Against a Relator Charged with Secretly Carrying on Gambling, When.*

An injunction against the stationing of police about a place of business in such a manner as to interfere with the business carried on therein will be refused, where the court has reasonable ground for the belief that things of a forbidden character, such as gambling, are being carried on in connection with such business, and the plaintiff in his testimony exhibits a lack of candor and a willingness to suppress the facts, and otherwise by his conduct forfeits his claim on a court of equity.

*J. S. Myers*, for plaintiff.

*Alfred Bettman* and *John Weinig*, contra.

HOFFHEIMER, J.

This is an action for injunction. Plaintiff charges in substance, that defendants (mayor, vice-mayor, safety director, chief of police) have conspired to injure him in his business, and that in pursuance thereof they have stationed a uniformed officer in his place of business with instructions to receive all telephone communications, and that they were otherwise interfering with said business, without authority or warrant of law; without invitation of plaintiff, and in violation of his constitutional rights; that defendants threaten to and that they will, unless restrained, continue to station a uniformed officer in said place of business; that said defendants have assumed arbitrary and autocratic authority without warrant of law, and will unless restrained injure and destroy his business to his great and irreparable injury, and that he is without remedy at law.

He prays that an order may issue restraining each of the said defendants, their agents or servants, from in any way intimidating, molesting or interfering with plaintiff in his said business; that a temporary restraining order issue against each of said defendants, their agents or servants from entering his said place of business and from in any manner interfering with said business or in any way interfering with the rights of persons visiting his said place of business or exercising surveillance over persons visiting the plaintiff's place of business, and that upon final hearing said order may be made perpetual, and for all further relief to which in equity he may be entitled.

After hearing the evidence in this case, I find myself beset with doubts concerning the true ownership of the business involved in this controversy, located at 44 East Sixth street, and with reference to which equitable relief is now sought.

And, irrespective of the question of ownership, whether by this plaintiff alone, or in conjunction with Samuel Hirsch, or others, I find I am not free from doubt, as to whether or not this business is not a part of, or not being used directly or indirectly, to further illegal acts, namely, gambling transactions of the kind commonly known as hand books.

These doubts are occasioned not alone by a number of circumstances that are very peculiar, to say the least, but they are intensified as the result of plaintiff's own conduct, while on the stand, by his lack of frankness, and by the suppression on his part of facts, which I can not but conclude was *intentional*, and this, too, under circumstances which made it imperative for him, seeking the equitable intervention of this court, to make the fullest disclosures and to withhold nothing.

The question as to whether or not these premises, or this cigar business, was being used either directly or indirectly, that is, as a "blind," for that secretive and most objectionable form of gambling, known as a hand book, or whether its owners or owner or any one in connection therewith, was engaged in that business, was not in its first instance for this court; nor do I now intend by anything I may say to actually adjudge any one guilty of such offense. That question belongs to, and properly is, for

1912.]

Hirsch v. Hunt.

another forum. A court of equity, however, will not issue an injunction at the suit of a person, where it appears that he is conducting an illegal business. See causes collated in note G, Section 402, 1 Pomeroy Equity Jurisprudence, third edition. It will not lend its aid to assist a gambling transaction. *Albertson v. Laughlin*, 173 Penn., 529.

Where the court, therefore, has reasonable grounds to believe or reasonably to suspect that business of such a character is being carried on in connection with the business for which relief is sought, or has doubts about it, which would seem to be more or less well grounded, and particularly if such doubts are due to the plaintiff's lack of candor or willful suppression of facts, having a possible bearing thereon, it would be its duty as a chancellor to refuse to hazard its process in such behalf, just as it would be its duty, to refuse to appoint a receiver to take charge of a business that did not *clearly* appear to it to be a perfectly moral and clean business.

These things are true, because equity is distinctly a court of conscience and of morals, and is ever jealous of its power. Knowing this, as I have said, it was particularly incumbent upon this suitor, asking the favor of this court, in view of the nature of the charges brought to the court's attention, to be above all things, frank with this court, and with these defendants, and to make the fullest disclosures on any and every matter, relevant to this particular litigation, and so as to relieve this court of any doubts.

The foregoing necessarily results from the fundamental maxim in equity, that he who comes into equity must do so with clean hands. Not only this, but he must keep them so. *Bispham's Equity*, Sec. 43, note.

There must be no willful misconduct by him who asks equitable interference, either in respect of the subject-matter in litigation (*Snell's Equity*, 25) or with reference to his procedure in that behalf. In *Brown v. Davis*, 23 U. S. Ap., 579-596, for example, the court withheld relief where there had been reckless charges of fraud and reckless evidence in support thereof.

The maxim referred to, unlike the maxim, that he who seeks equity must do equity, where the court as a condition or price of

conferring the remedy may compel a suitor to provide for a corresponding equity of the defendant, is *restrictive* in its operation.

It assumes that the suitor, asking the aid of a court of equity, has himself been guilty of conduct in violation of the fundamental conceptions of equity jurisprudence, and therefore refuses him *all* recognition and relief, with reference to the subject-matter or transaction in question. It \* \* \* closes the door of the court against such suitor and refuses to acknowledge his right or to award him any remedy. 1 *Pomeroy Equity Jurisprudence*, Sec. 397.

And it is said, at Section 398 *ibid*, while a court of equity endeavors to promote and enforce justice, good faith, uprightness, fairness and conscientiousness on the part of the parties who occupy a defensive position in judicial controversies, it no less *stringently* demands the same from the litigant parties, who come before it, as plaintiffs, or actors, in such controversies.

And again at Section 404, the learned author says:

“It is not alone fraud, or illegality, which will prevent the suitor from entering a court of equity; *any really unconscionable conduct connected with the controversy to which he is a party*, will repel him from the forum whose very foundation is good conscience.” [Italics mine.]

I have said that whether this business was directly or indirectly, engaged in a hand book was not originally a question for this court, but the stationing of police officers in this place of business, by a department of our municipal government, presumably in an honest effort to detect or prevent crime, and following a “raid” made by it on the office of Samuel Hirsch in the Lyric Theatre Building, where they confiscated papers and telegrams but lately addressed to 44 East Sixth street, because of the nature of transactions therein indicated, made the question as to the character of the alleged cigar business at 44 East Sixth street, in view of the authorities cited, of importance here.

This plaintiff, Adolph Hirsch, claims that he alone is the owner of the business at 44 East Sixth street. He claims that he is a retail cigar dealer; that his business is legitimate, and in no way



1912.]

Hirsch v. Hunt.

used for transactions such as we have been speaking of. He asserts that he bought the cigar business from his brother Samuel some eight years ago.

In view of these claims is it not *strange* that when, in the latter part of last January or February, the police had been stationed there, evidently as it was then suspected of being a hand book, we find Samuel Hirsch taking it upon himself to see the mayor of our city (a defendant here) requesting him to withdraw the police from *his* store, and assuring him, that on any further complaint the police might be again reinstated? Surely such action must have been known to this plaintiff. It strikes my mind as being very strange also, if this plaintiff is really the owner of the cigar business at 44 East Sixth street, and has been for the last eight years, as he claims, that we should find in the telephone directory of June, 1912, not the name of this plaintiff but "*Samuel Hirsch, Cigars, 44 East Sixth street.*" It must be borne in mind that it is claimed that Samuel Hirsch did not even have an office at 44 East Sixth street, for contemporaneously or practically so with his avowal to the mayor as already alluded to, he set up an office in the Lyric Theatre Building, where ostensibly he became engaged, not in cigars, but in the "voting booth business." I do not say that any of these matters standing by themselves, prove ownership in said Samuel Hirsch of this cigar business, but I do say, that to the extent this plaintiff knew or suffered these things to be done, as otherwise indicated in evidence, they are circumstances that can not be wholly cast aside, when considering a thing as *elusive* as a hand book. At or about the time Samuel Hirsch opened his office in the Lyric Theatre building, George Faber and Louis Gatto were taken into the store at 44 East Sixth street, and employed by this plaintiff, so he says, as *clerks*. Chief of Police Copelan says these men had theretofore been suspected by the department of hand booking, and that the places of both or of one of them (I am not positive whether it was one or both), was closed by order of the police. Will it be said that the employment of both of these men in the capacity of cigar clerks

and at the Hirsch store, and at this time, was but a *mere coincidence?*

We find further, that *months* after Samuel Hirsch is supposed to have moved his office to the Lyric Theatre Building, where he is engaged in the voting booth business, telegrams in secret code and otherwise, all confessedly relating to racing matters and to betting come addressed to him *at 44 East Sixth street*. Some of these telegrams are signed in initials; others are from another *brother*, Nathan, who surely must have known if these telegrams had nothing to do with 44 East Sixth street, that since January or February Samuel's office was in the Lyric Theatre Building. Another telegram notably the "My Gal" telegram is to Hirsch's cigar store, 44 East Sixth street, and another to Nathan Hirsch, 44 East Sixth street. None, it may be said are addressed to Adolph Hirsch, *eo nomine*, and notwithstanding he must have known of Samuel's avowal to the mayor, we find him not only allowing these things to be done, but complaisantly opening telegrams, not addressed to him, but to his brother, which however, we are at once informed was by *request only!*

The telegram addressed to Hirsch Brothers, 44 East Sixth street, contains simply the words "My Gal." When plaintiff was shown this telegram (and another containing the words "Paris Green") and asked as to the meaning, his *manner of answering* and the *apparent evasiveness* of his reply were not calculated to inspire the confidence of the court, or to dispel doubts. He said "*he had no idea about it.*" On being further pressed he admitted he knew said telegrams referred to racing matters; that his brother owned a race horse, etc.

Now, notwithstanding plaintiff admitted he received at his store and himself opened telegrams, he repeatedly protested that he had nothing to do with that business or that they had any thing to do with him. But all these matters appearing, was it not of extreme importance that he manifest all possible diligence in bringing into court all books, papers and documents that he possessed, and which were asked for, in order that all possible doubts as to these things having some connection with his alleged business, might be set at rest?

1912.]

Hirsch v. Hunt.

Plaintiff was asked for his books. He said he kept none and produced none, save a couple of bank pass books. He claimed that his business was small. He said he did an average daily cash business amounting to \$25 a day, save on Saturdays, when it aggregated \$50. He did no credit business, so he says, and when occasionally credit was extended, it was in some small amount and he asserted *no memorandum charge would be made of the transaction whatever!*

Current accounts of merchandise purchased are in his name, and some bills exhibited, show this to be true; he pays by check, keeping no stub memorandum; but he did say that he kept canceled checks, and produced a very limited number, which, so far as we can see, purport to be for legitimate transactions.

A very recent lease is made out in his name, and by virtue of it, he pays a rental of \$200 per month. In the absence of any books or memoranda kept in the course of business and taking his mere statement on such matters, it would seem by contrasting the necessary expenses for the upkeep and running of this cigar store, including the purchase of merchandise, rent, living expenses, clerk hire and other necessary expenses, with the cash returns of the cigar business that it was in reality a rather small business. Yet in August a bank pass book indicates a single batch of returned checks approximating ten thousand dollar transactions (a rather large amount of dealings for this rather small business) and not satisfactorily explained. He was asked to produce these canceled checks. He had said, as we have heard, that he kept canceled checks. We have already seen that he was able to produce some checks which would seem to indicate legitimate transactions. Plaintiff, however, *failed to produce any of this ten thousand dollar lot*, although he was given ample opportunity so to do.

Considering now that this is an action against public officials, acting in their official capacity, and in an endeavor to suppress crime, and this being an action for injunction, where vigilance and caution are specially enjoined upon the court (*Albery v. Sessions*, 2 Nisi Prius, 237), is this court overly vigilant or un-

duly cautious, when it asks itself: would these checks or any of them, have thrown any light on the ownership of this store, doing this small cigar business? Would they have shown that this business was being used directly, or indirectly, for hand book purposes? And is there any peculiar significance in the stubborn fact, that this particular batch of checks, for this large sum of money, relates to the *precise period of time when telegrams such as those confiscated by the police, were, as we now know, being repeatedly addressed to Samuel Hirsch, Nathan Hirsch, Hirsch's Cigar Store, 44 East Sixth street, and were being opened by Adolph Hirsch by request?*

The failure to produce one's books or other memoranda, or even the failure to produce a lot of canceled checks under ordinary circumstances might be reconciled with the best of faith, but when we consider such failure under circumstances such as we have here detailed, and when we consider it in connection with the further remarkable fact, that out of a lot of canceled checks returned to plaintiff from the Columbia Bank, *during the noon adjournment hour of the very day of this hearing*, there were strangely missing and wholly unaccounted for, checks for \$700 (plaintiff could give no satisfactory explanation), has not this court reasonable grounds for its misgivings—is it not justified in concluding, that the suppression of all these checks was designed and willful?

Such reckless evidence, such manifest lack of good faith is precisely that conduct of which Pomeroy speaks when he says: "It will repel the suitor from a forum whose very foundation is good conscience" (*supra*). It is needless to say more. In my opinion this plaintiff, under all the circumstances has forfeited his claim upon a court of equity, and accordingly, his prayer for an injunction will be refused.

Having thus concluded, any opinion I may hold on the question as to the alleged illegal acts of defendants and as set out in the petition, and as to whether such acts are enjoinable in equity, as for continuous trespass if there is irreparable injury or multiplicity of suits to be avoided—a question of prime importance to

1912.]

State v. Railway.

the citizen and one upon which I entertain definite notions—becomes wholly immaterial.

It suffices to say that plaintiff, no matter what his rights may have been, for the reasons given and in accordance with fundamental principles of equity, is remitted to whatever remedy he may have at law.

Petition dismissed.

### FORFEITURES UNDER THE RAILWAY COUPLER ACT.

Common Pleas Court of Hamilton County.

THE STATE OF OHIO V. THE PITTSBURGH, CINCINNATI, CHICAGO  
& ST. LOUIS RAILWAY CO.

Decided, June 18, 1912.

*Railways—Equipment of Cars with Automatic Couplers—Dirt Trains are Engaged in "Traffic"—Purpose of the Act is Protection of Train Operatives—Acts of 1902 and 1906 Harmonized.*

1. The moving of dirt by a railway company from one point on its line to another, for the purpose of constructing a yard or fill, constitutes "traffic" within the meaning of Section 8950, P. & A. Anno. G. C., requiring that all cars used in moving state traffic be equipped with automatic couplers.
2. The use of cars equipped with couplers of the character specified by the statute, except that they will not couple by impact, subjects the company to forfeitures as provided by Section 8965, relating to couplers out of repair, rather than to the forfeiture provided in Section 8954, relating to cars which have not been equipped with couplers.

*John V. Campbell and Charles A. Groom, Assistant Prosecuting Attorneys, for the state.*

*Robert Ramsey, contra.*

CUSHING, J.

This action is brought by the state of Ohio against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, a corporation, to recover the sum of \$1,100 as a penalty for the violation by the defendant company of an act of the Legislature

of Ohio, passed March 19, 1906 (98 O. L., 67), for using eleven cars in state traffic contrary to the provision of the act in question. The state filed a petition. The defendant filed an answer and an amended answer. The pleadings state the facts, and it is sought by a ruling of the court to determine the question of law involved, assuming the facts to be as stated in the pleadings.

The pleadings present two questions for determination:

1st. Is the moving of dirt from one point on the defendant company's road to another for the purpose of making a yard or a fill, traffic within the meaning of the act of the Legislature above referred to?

2d. Does the act of the defendant company as stated in the pleadings come within the provisions of the act of March 19, 1906, and what effect, if any, did the enactment of that law by the Legislature have upon another act of the Legislature of Ohio passed May 12, 1902?

The act of the Legislature of the state of Ohio, passed March 19, 1906, reads as follows:

Sec. 2. "That it shall be unlawful for any such common carrier to haul, or permit to be hauled or used on its line, any locomotive, car, tender, or similar vehicle used in moving state traffic, not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

Section 6 of the same act provides a penalty of \$100 for each and every such violation to be recovered in an action against the offender.

Act of May 12, 1902, Section 3565-23e, Revised Statutes:

"It shall be the duty of the inspector to inspect the couplers.  
\* \* \* He shall also on discovering a defective coupler  
\* \* \* immediately report the same to the superintendent  
of the road \* \* \* and to the agent thereof." \* \* \*

Section 3565-23f, Revised Statutes:

"Any road whose superintendent or station agent shall receive such notice \* \* \* shall cause the same to be immediately repaired." \* \* \*

1912.]

State v. Railway.

## Section 3565-23h, Revised Statutes:

“Any railroad which fails to comply with any of the provisions of this act shall forfeit and pay to the state of Ohio, the sum of twenty-five (\$25) dollars for each day such defective coupler \* \* \* is kept in use contrary to the provisions hereof.”

The two acts in question are inconsistent in that the act of 1902 provides for inspection of couplers with a penalty of \$25 a day for each day a car is used when the said couplers are out of repair, while the act of 1906 provides a penalty of \$100 for the defendant to haul or permit to be hauled or used on its line a car not equipped with automatic couplers.

It does not seem necessary to discuss at any length the question made by the defendant company as to whether the hauling of dirt from one point to another on the company's road is traffic within the meaning of the acts quoted. The acts in question were passed for the purpose of protecting the operatives of railroads, and while traffic in its broader sense is transportation of goods along the line of travel, as a road, railway, canal or steamboat route, it could hardly be said that because the company was moving dirt from one point to another on its line, that that act was any different from hauling grain from one station on the company's line to another. The apparent purpose for which the acts were passed was the protection of the operatives of the railroad, and the material with which the trains were loaded could hardly make any difference.

The state claims in the case at bar that under the above section of the statute the defendant company is liable to the state in the sum of \$100 for each time a car is hauled in traffic when the same is not equipped with couplers as provided in the act of 1906, or if the cars are so equipped and the same are in such condition that they do not couple automatically by impact and can not be uncoupled without the necessity of men going between the cars, then the company is liable in the sum above stated.

The defendant claims that it is not liable under the facts stated in the petition in this case; that the acts above quoted were passed to accomplish an entirely different purpose; that the act of 1902 was intended to and did give the state supervi-

sion over all couplers on all railroad cars and provided a penalty for each day a car was used with a coupler out of repair, and that the act of 1906 specified the kind of couplers with which all railroad vehicles should be equipped and provides a penalty for each time a car or vehicle is hauled when not so equipped, and therefore it would be liable for the penalty under the act of 1906 only in case of a failure to equip its cars as provided in that act, and that it would be liable under the act of 1902 if those couplers were out of repair or in such condition that they could not be used as provided in that act.

One of the fundamental principles of the construction of statutes is that the court shall determine and declare the intention of the Legislature in passing the act or acts in question, that statutes shall be so construed that each shall, if it can be done, be given the effect the Legislature intended it to have, and that in arriving at that intention the language used shall be given its plain, ordinary meaning.

In passing upon what appear to be conflicting statutes the Supreme Court of Oklahoma has this to say:

“It is the duty of the court to endeavor to reconcile the statutes whenever it is possible to do so in order that the legislative intent may be, as far as possible, effective, and to support the theory as fully as may be done, that as a body of revised laws adopted at the same time they are of equal force and effect, and all intended to stand with as little interference as possible, of judicial interpretation, and it is the duty of courts to endeavor to harmonize the various parts of the statute with each other. One part of the statute will not be allowed to defeat another, if, by any reasonable construction, the two may be made to stand together.”

In expressing the views of the courts text-writers have this to say:

“Statutes should be construed according to the intention of the Legislature which passed the act. If the words of the statute are of themselves precise and unambiguous, then no more can be necessary than to expound these words in their natural and ordinary sense. The words themselves do in such case best declare the intention of the Legislature.” *Sutherland on Statutory Construction*, Section 389, citing 177 Ill., 234.



1912.]

State v. Railway.

It is also the law that:

“Laws are presumed to be passed with deliberation, and with full knowledge of all existing ones on the same subject. And it is, therefore, but reasonable to conclude that the Legislature, in passing a statute, did not intend to interfere with or abrogate any prior law relating to the same matter, unless the repugnancy between the two is irreconcilable; and hence a repeal by implication is not favored. On the contrary the courts are bound to uphold the prior law, if the two acts may well subsist together.” *Landis v. Landis*, 39 N. J. L., 277.

In the act of March 19, 1906, the word “equipped” seems to have occasioned a difference of opinion as to the exact meaning. The word equipped as used in the act means to fit out, to furnish for service, to provide with what is requisite for effective action. There is nothing in the statute to indicate that any other use was made of the word than the definition given by lexicographers. The act provides that it shall be unlawful to haul a car not equipped with couplers, etc. It would therefore seem clear that the intention of the Legislature was to compel railroads to equip, fit out, furnish for service cars with couplers of the character designated in the act. But counsel for the state contend that because it uses the language “coupling automatically by impact and can be uncoupled without the necessity of men going between the cars,” that it provides for the operation as well as equipping of the cars. Unless a meaning is given to the word equipped other than that above stated, the part of the sentence following that word is descriptive of the character of the couplers and how they shall operate, and it seems to me that in view of the supervision that the state has assumed over the inspection of couplers, that the act of 1906 must relate solely to the equipping of the cars with couplers, and provides a penalty for hauling a car not so equipped.

It is claimed by counsel for the state that the United States courts have held that the safety appliance act passed by Congress April 1, 1896, United States Revised Statutes, Volume 27, page 532, covers the subject of couplers and that the construction given to that act should be given to the Ohio law on the same subject. The United States safety appliance act reads as follows:

Sec. 2. "That on and after the first day of January, 1896, it shall be unlawful for any such common carrier to haul, or to permit to be hauled or used on its line, any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

The language of the act of 1906, of the Legislature of Ohio, was taken from the act of Congress above referred to, and if that were all that the Ohio Statutes contained on the subject of couplers I would unhesitatingly follow the decisions of the United States court on the subject. It has not been pointed out to me, and I have been unable to find any act of Congress giving the government the supervision, inspection and control over the couplers on cars used in interstate traffic, as has been assumed by the state of Ohio with reference to state traffic. Therefore the question here is the construction of the two acts of the Legislature of Ohio, and by that construction to determine whether the later act repealed the former or rendered it inoperative.

The act giving the state of Ohio supervision over couplers was passed in 1902. The act under which this suit is brought was passed in 1906. Does the act of 1906 repeal or render inoperative the act of 1902?

The general rule is that:

"When some office or function can by fair construction be assigned to both acts, and they confer different powers to be exercised for different purposes, both must stand, though they were designed to operate upon the same general subject. \* \* \* There must be such a manifest and total repugnance that the two enactments can not stand. The earliest statute continues in force, unless the two are clearly inconsistent with and repugnant to each other. \* \* \* Where two acts are seemingly repugnant, they should, if possible, be so construed that the latter may not operate as a repeal of the former by implication." 1 *Sutherland on Statutory Construction*, Section 247.

The Supreme Court of North Carolina, in passing on this question, say:

"1. The law does not favor the repeal of an older statute by a later one by mere implication.

1912.]

State v. Railway.

“2. The implication, in order to be operative must be necessary, and if it arise out of repugnancy between the two acts, the later abrogates the older only to the extent that it is inconsistent and irreconcilable with it. A later and an older statute will if possible and reasonable to do so, be always construed together, so as to give effect not only to the distinct parts and provisions of the latter, not inconsistent with the new law, but to give effect to the older law as a whole, subject only to restrictions or modifications of its meaning, where such seems to have been the legislative purpose. A law will not be deemed repealed because some of its provisions are repeated in a subsequent statute, except in so far as the latter plainly appears to have been intended by the Legislature as a substitute.” *Winslow v. Morton*, 118 N. C., 491-492.

The Supreme Court of Oregon, passing on the same question, uses the following language:

“Is there such repugnancy between the two acts \* \* \* that the two can not stand together? If there is, according to well settled rules of construction, the last act repeals the former by implication. It may be proper to remark in this connection that repeals by implication are not favored. By that I understand it is the duty of the court to so construe said acts, if possible, that they shall both be operative.” *State v. Dupuis*, 18 Ore., 372, at 375.

Counsel for the state cite the case of *United States v. Chicago, Milwaukee & St. Paul R. R.*, 149 Fed., 486, syllabus 4:

“When an interstate carrier hauled cars considerably damaged by derailment so that the coupling devices were gone, 379 miles, past three or more places where repairing is done, in order to make the repairs at a larger and better equipped shop, it violated the safety appliance law.”

Counsel for the state in their brief on page 5 say:

“Decisions upon this point can be multiplied, but the law is settled and the decision last quoted is so pat as to dispose of the issue.”

I am inclined to agree with counsel for the state in the conclusion reached in the sentence just quoted. It should be noted, however, that in the case on which he relies the facts stated

were that the cars were so damaged by derailment that the coupling devices were gone. Then the railroad company must have moved the cars in traffic without couplers of the kind designated in the safety appliance act. Applying the law to the facts in that case, I do not see how the court could have come to a conclusion other than it did.

The Ohio law is different in one respect from the safety appliance act passed by Congress. The Ohio law divides the subject into two branches, one of equipping its cars, and the other of keeping its couplers in repair.

The pleadings in this case, and it is agreed by counsel that they state the facts, specifically state that just prior to the hauling of the cars complained of by the state, the cars were equipped with the kind of couplers specified in the act of 1906, but they were not coupled by impact, and as I understand it they could not be uncoupled without the necessity of men going between the ends of the cars. If they had such couplers on, then either they were not used or they were out of repair, and if the two sections of the statutes of Ohio are to be given effect, one must relate to the couplers and the other to the use of the couplers when the cars are so equipped.

It seems to follow that the Ohio law with reference to state traffic is different from the act of Congress with reference to interstate traffic. To hold that the penalty provided by the act of March 19, 1906, should be collected under the facts stated in the pleadings in the case at bar, would be to hold that the act of April 1, 1902, was repealed by implication or that the passage of the act of March 19, 1906, rendered that statute inoperative.

If I am correct in the conclusion that the law is, that it is the duty of courts in construing statutes to give that construction, if it can reasonably be done, that will make effective both statutes, then I must conclude that the act of March, 1906, related exclusively to the equipping of cars with couplers, and that the act of April 1, 1902, provides a method of inspecting the cars, seeing that the couplers are in repair and a penalty for operating a car with a coupler that is out of repair or not used.

A decree will be entered accordingly.

1912.]

Richards v. Richards.

**NECESSARY PARTIES IN AN ACTION IN PARTITION.**

Common Pleas Court of Licking County.

GEORGE RICHARDS ET AL V. HOWELL RICHARDS ET AL.

Decided, April Term, 1912.

*Partition—Husbands and Wives of Tenants in Common Not Necessary Parties—Division of Fee to Counsel Filing the Action May be Made to Other Counsel in the Case, When.*

1. Counsel other than for the partitioner in a partition case, who perform services which are of benefit to the parties in interest and assist in the determination of the case, are entitled to share in the fee regularly allowed to counsel for the petitioner, but are not entitled to an extra counsel fee on account of such services.
2. The wives and husbands of tenants in common are not necessary parties to an action for partition, and counsel whose services consisted in bringing into the case the wives and husbands of the tenants in common in the lands sought to be partitioned are not entitled to share in the counsel fee to be awarded in the case. *Weaver v. Gregg*, 6 Ohio State, 547, and *Mandel v. McClave*, 46 Ohio State, 407, distinguished.

*Kibler & Kibler*, for the application.

*Fitzgibbon & Montgomery*, contra.

WICKHAM, J. (orally).

On January 26, 1912, the plaintiffs, George Richards and Alice Brooks, filed their petition against Howell Richards et al, for the partition of certain lands owned by the plaintiffs and the defendants, who were tenants in common.

The plaintiffs and the defendants, with possibly one exception, were married men and women. The husbands and wives of the tenants in common were not made parties to the suit. Afterwards, on the 8th of March, 1912, one of the defendants, Charles Richards, filed an answer and cross-petition in the case, and in his cross-petition he sets out the facts that the plaintiffs and defendants were married, and sets out the names of the hus-

bands and wives of the tenants in common. He prayed that the husbands and wives be made parties to the partition suit, which was done. The cause then proceeded by due course to the decree in partition. Commissioners were appointed, who reported that the lands could not be divided by metes and bounds, and returned an appraisement. The land was sold by order of the court; the report of the commissioners was confirmed and the deed and distribution was ordered, and a counsel fee was allowed by the court in the case.

Kibler & Kibler, representing the cross-petitioner, moved the court for an allowance to them of a part of the counsel fees in the case.

If the husbands and wives of the tenants in common were necessary parties, the services of Kibler & Kibler were of value and of benefit to the parties to the suit, and under the rule as we understand it they would be entitled to a portion of the counsel fee allowed by the court in the case.

It has been the practice, so far as we understand it, in partition cases, where counsel other than those who file the petition perform services which have resulted in a benefit to the parties, and have assisted in the prosecution of the case and in carrying it through to the final determination, to award to them, not an extra counsel fee in the case, but a part of the counsel fee allowed to counsel in the case by the court. In other words, they share, not equally always, but share with counsel for the plaintiff in a division of the counsel fees.

We think there can be no doubt about that being the rule, and so we think there is but a single question involved in this case, and that is whether the husbands and wives of the tenants in common were necessary parties.

It follows that if they were not necessary parties, all that was done by Kibler & Kibler in bringing them into the case did not result in any benefit to the parties in the case, and therefore their services would not be of value, and they would not be entitled to a part of the counsel fee.

It was held by the Supreme Court of this state in *Weaver v. Gregg*, reported in 6 O. S., 547, that the husband or wife of a

1912.]

Richards v. Richards.

tenant in common in a partition suit was not a necessary party. In that case George Weaver was the owner of an undivided one-fourth of certain lands in Pickaway county. He and his wife were married in 1819, and were husband and wife in 1840. In that year a partition suit was brought to partition the lands in which George Weaver owned an undivided one-fourth. His wife was not made a party defendant. The lands were sold in the partition proceedings. In 1848 George Weaver died, and thereupon his wife brought an action against the purchaser of the land for the assignment of dower, claiming that she was not a party to the partition suit in 1840, and that the decree of partition did not extinguish her dower; that she was still entitled to dower, and that upon the death of her husband her dower became consummate, and that she was entitled to a life estate in one-third of his land. The Supreme Court held that she was not entitled to dower; that she was not a necessary party in the partition suit, and that by the sale of the lands in partition her dower was extinguished. That has been recognized, I think, as the law since the decision of that case.

We are cited to a recent decision of the circuit court of this circuit, in the case entitled *Hand v. Kibler* (unreported), and it is claimed by Kibler & Kibler that the court decided that the wife was entitled to the value of her inchoate right of dower on the distribution of the proceeds of the sale of land in a partition case.

The circuit court in their opinion said that the decision in the case of *Weaver v. Gregg* was in conflict with the later decision of our Supreme Court in the case of *Mandel v. McClave*, 46 O. S., 407.

The applicant for a part of the proceeds to be distributed in the case of *Hand v. Kibler* was the divorced wife of the tenant in common. The circuit court held that she was entitled in the distribution of proceeds, to the present value of her inchoate right of dower.

We are unable to agree with the circuit court that the decision of the Supreme Court in *Mandel v. McClave* conflicts with the decision of the court in the case of *Weaver v. Gregg*.

In *Mandel v. McClave* the question was different. There the question was whether the wife was entitled to the value of her dower as against the creditors of her husband. Mandel and his wife had executed two separate mortgages upon their interest in the land owned by him. A suit was brought to foreclose the mortgages. In the meantime judgment had been rendered against Mandel in favor of other creditors, and those judgments were liens upon the land. The land was sold in the foreclosure proceedings, and it came to the distribution of the proceeds. Mrs. Mandel made an application to the court for an allowance to her out of the proceeds of a sum of money representing the present value of her inchoate right of dower as against the claims of the judgment creditors, and the court held that she was entitled to the present value of her inchoate right of dower in the whole premises, or rather the whole value of the land, as between her and the judgment creditors of her husband. They regarded her in the character of a surety and her husband as that of the principal debtor. They say (page 414):

“As between each other he would be the principal and she his surety. We think the same principle should be applied to her contingent right of dower.”

The court held that by signing mortgages releasing her dower it inured only to the benefit of the mortgagees, and did not inure to the benefit of the subsequent judgment creditors. There being sufficient funds to satisfy the mortgages, but not sufficient to pay the other judgments which were liens, that as between those judgment creditors and Mrs. Mendel she was entitled to the value of her inchoate right of dower out of the entire proceeds, and they awarded it to her.

In that case the court call attention to other decisions of the Supreme Court, among the rest *Kling v. Ballentine*, reported in 40 O. S., 391. In speaking of the case of *Kling v. Ballentine*, the court say:

“In that case the contest was between the widow and certain devisees, who were daughters of the husband. The widow had, during her husband’s life, joined with him in a mortgage of his



1912.]

Richards v. Richards.

lands to secure his debt, and that court held, as against the husband's devisees, who were his daughters, the widow was entitled to dower in the whole of the lands, to be paid out of the surplus after the mortgage debt had been paid, thus exhausting the husband's interest before resorting to the wife's dower. In that case the devisees were entitled to all the interest of the husband, their devisor, as in the case at bar the judgment creditors were entitled to all the interest of their debtor in the fund. The principles that underlie and justify the holding of the court in that case are the same which we apply to the case before us; they are, that the contingent interest of the wife to dower in her husband's real estate is valuable, and that her release of it by joining with him in a mortgage to secure his debt, is not a technical bar, and inures only to the mortgagee and those claiming under him."

The circuit court of this circuit in the Hand-Kibler case say that the case of *Weaver v. Gregg* and *Mandel v. McClave* are in conflict. But, as said in *Mandel v. McClave*, *Kling v. Ballentine*, and other cases cited, the question was not between the husband and wife, but between the wife and creditors of the husband.

We find in another circuit court decision of this state where the court cites the case of *Weaver v. Gregg* approving it, and quotes the language of the court in their opinion. The decision of that circuit court was rendered after the case of *Mandel v. McClave* was decided, so it appears that the circuit court which decided that case did not understand that *Mandel v. McClave* overruled *Weaver v. Gregg*, or was in conflict with it. *Mandel v. McClave* was decided in 1889, and the case I speak of, *Gillett v. Miller*, 12 C. C., 209, was decided in 1895. On page 212, Judge Day, who rendered the opinion, cites the case of *Weaver v. Gregg* and quotes part of the opinion. In that case the question was substantially the same as that in the case of *Mandel v. McClave*, and the court held in line with *Mandel v. McClave*, that the wife, as between herself and the creditors of her husband, was entitled to the present value of her inchoate right of dower in the whole lands owned by him.

In the case before us now, there is no question of the rights of creditors, and so far as it appears from the record no creditors

had liens upon the land. It is the simple question whether, in the partition of lands among tenants in common, their spouses are necessary parties. That depends upon and is determined by the solution of the question whether the husband or wife, as between the tenant in common and his spouse, is entitled to receive the present value of his inchoate right of dower upon the distribution of the funds arising from the sale of the common estate.

It has been held by one of the nisi prius courts of this state that in a partition suit the wife is a necessary party, and that she is entitled to a distributive share of the proceeds of the sale of the land; that is, she is entitled to the value of her inchoate right of dower. In another nisi prius decision it is held the other way. The Common Pleas Court of Franklin County, on an application made by the wife, whose husband was a party to the suit and a tenant in common in the land, decreed and ordered the value of her inchoate dower in his interest to be distributed to her. In another nisi prius court in Delaware county, the wife was the owner of the real estate, and her husband had abandoned her. They were living separate and apart, although they were husband and wife. The husband came in and asked to be made a party, which was done. He filed an application and asked the court to pay over to him the present value of his inchoate dower in his wife's interest in the land. The court refused to do so and ordered the whole amount to be paid to the wife.

I can see a distinction in the case before us now and the Hand case cited by counsel, which I understand is now pending in the Supreme Court. It seems to me that it was unnecessary for the circuit court to say in their opinion that the case of *Weaver v. Gregg* and *Mendel v. McClave* are in conflict. The distinction is this: in the Hand case the wife had been divorced from her husband for the husband's aggressions. By force of the statute she retained her dower interest in his land of which he was seized at the time the decree of divorce was granted. If she had not received the value of her inchoate dower from the sale of his land in partition on the distribution of the proceeds, she would lose her interest in that part of his estate. Or, in other words,

1912.]

Richards v. Richards.

if the purchaser of the land in that suit took the real estate free and divested of her dower interest, and the whole of the funds was distributed to the husband, she would have no lands in which to claim dower in the event of his prior decease, nor could she on his death claim an interest in his personal estate.

It is to be presumed that in the decision of a divorce case the court protects the interests of the wife in the personal estate of her husband by an allowance of alimony. There is no provision of law for a divorced wife to share in the personal estate of a deceased former husband. The law is that the divorced wife does not take dower in after-acquired real estate of her husband. It is only by force of the statute that she retains her dower in the real estate of which he was seized at the time of the decree of divorce, or any time during coverture, if she has not released her dower. If the husband invests the funds arising from the sale of his interest in land in other real estate, his wife's dower right immediately attaches. If he does not invest it in real estate, it is personal property, and if he dies seized of personal property his wife is entitled, under the law, to her share in his personal estate. But if a decree of divorce has been granted these results do not obtain in favor of the divorced wife.

So it seems to me that there could be a good ground for a distinction in a case where a man and woman are husband and wife, and in a case where that relation has been extinguished by a decree of divorce.

It has been the practice, almost or quite universal in this state, that where lands are sold in partition cases in which a husband or wife is a tenant in common, upon a distribution of the proceeds of the sale of the land, the share of the fund is distributed to the owner of the interest in the land, the tenant in common. It has never been the practice to divide the share, and distribute a part to the tenant in common and a part to the husband or wife, as the case may be, as the present value of the inchoate dower.

There is no more reason for that than there would be to distribute a part of a judgment paid by a land owner, whose lands have been taken for public use under the law of eminent domain.

In the exercise of the right of eminent domain, land may be taken for public use. The value is fixed by a jury, judgment is rendered in favor of the land-owner, and the amount or value of the land is paid to him. But so far as I know I have never heard of a division being made between husband and wife in the distribution of that fund. So it would be the same where the husband owns land and dedicates it to public use. The dower right of the wife becomes extinguished. It would hardly be claimed that where a husband, if he owns land and dedicates it to public use, and afterwards dies, that his wife has a dower interest in it; or if it be appropriated in a writ brought for that purpose, and the value be found and the money paid to the husband, that the wife would be entitled to afterwards claim dower in that same land, on the ground that she was not made a party defendant in the appropriation case.

We might say further that there is no provision of the statutes for paying to the wife the value of her inchoate dower. The section of the statutes which provides for distribution in partition cases is Section 12039, General Code. That section reads:

“The money or securities received from a sale of, or an election to take the estate, shall be distributed and paid, by order of the court, to the parties entitled thereto, in lieu of their respective parts and proportions of the estate, according to their rights therein.”

That means an aliquot part or proportion—the part or proportion which is owned by the tenant in common, and does not and can not be construed to mean an interest undetermined, which may never become consummate, like the inchoate right of the wife's dower.

The Supreme Court of Indiana, it seems, understands from a consideration of the cases decided by the Supreme Court of Ohio, that *Weaver v. Gregg* is still the law. In the case of *Hagerty v. Wagner*, reported in 39 L. R. A., 384, it is said, at page 392:

“In *Weaver v. Gregg*, 6 O. S., 547, it is held in a very able opinion by Brinkerhoff, Judge, speaking for the whole court,

1912.]

Sucher v. Burger.

that a partition sale and deed, without making the wife of a co-tenant a party, extinguishes her inchoate right of dower, under statutes similar to our own, and passes the entire estate to the purchaser. Appellee's learned counsel contend that the case just cited has been overruled by the Supreme Court of the state of Ohio in the following cases: *Black v. Kuhlman*, 30 O. S., 196; *Unger v. Leiter*, 32 O. S., 210; *Dingman v. Dingman*, 39 O. S., 17; *Mandel v. McClave*, 46 O. S., 407. We have examined these cases and find they do not even touch the subject, much less do they overrule the doctrine laid down in *Weaver v. Gregg*, that a partition sale extinguishes the inchoate right of dower of the wife of one of the co-tenants, without making her a party."

We hold that the wife of a tenant in common is not a necessary party in a partition suit. As between husband and wife our Supreme Court never yet has gone to the extent of holding that she is a necessary party and entitled to share in the fund arising from the sale of the land. It is not necessary to do so to protect her interests.

We overrule the motion of Kibler & Kibler for an allowance of a portion of the attorney fees in the case. Exceptions are noted.

---

#### DISCRETION OF COURT IN REQUIRING PHYSICAL EXAMINATION OF PARTY TO ACTION.

Common Pleas Court of Hamilton County.

LILLIAN MARIA SUCHER V. WILLIAM BURGER ET AL.

Decided, January Term, 1912.

*Breach of Promise—Defense of Physical Incapacity—Plaintiff Required to Submit to an Examination—Discretion of Court—Privilege of Physician—Evidence—Section 11497.*

1. It is within the discretion of a trial judge to require an adverse party to submit to a physical or medical examination, and the physician making such examination can not claim privilege, but may be required to testify as to the condition of said party.
2. Such an examination may be required in an action for breach of promise to marry, where the physical incapacity of the plaintiff has been asserted as a defense.

*D. S. and L. D. Oliver*, for plaintiff.

*Workum & Bowdle* and *Frank Seinsheimer*, contra.

GORMAN, J.

This is an action to recover damages for breach of promise of marriage. The case is now at issue, the defendant having answered and set up therein that the plaintiff at the time of the promise of marriage was physically incapacitated from entering into the marriage contract, which incapacity was known to the plaintiff but unknown to the defendant. He further avers that upon discovering that the plaintiff was suffering from a physical ailment an effort was made by a physician skilled in medicine and surgery to bring about a cure for the plaintiff, but the same was not done.

A motion is now interposed to require the plaintiff to submit to a physical examination by a competent surgeon and physician to be named by the court or by the parties. This motion is resisted by counsel for the plaintiff upon the ground, as claimed, that there have been physical and medical and surgical examinations heretofore made of the plaintiff's person and that no order should now be made requiring the plaintiff to submit to another and further physical, medical, or surgical examination.

The answer does not disclose that the physicians and surgeons employed to attend the plaintiff were employed by the defendant, although it is averred that the defendant paid the bills. If these surgeons and physicians were employed by the plaintiff then they would not be permitted to testify as to the result of their medical and surgical examinations and treatment of the plaintiff, because any communications to them by the plaintiff and any information secured by them as her physicians and surgeons are privileged and they could not be disclosed except by the consent of the plaintiff. It may therefore be very material and essential upon the trial of this case to have the testimony of a competent surgeon and physician as to the physical condition of the plaintiff and her ability to enter into the marriage contract, and the parties should be placed in a position where they can secure this evidence without being placed at the mercy of the plaintiff herself or her physicians or surgeons.

1912.]

Sucher v. Burger.

A physician and surgeon who makes an examination under the orders of the court could not claim privilege, but would be required to testify as to the result of his examination and discoveries.

I believe that under Section 11497, General Code, the court has the power to require the adverse party to submit to a physical, medical and surgical examination.

This section reads in part as follows:

“At the instance of the adverse party, a party may be examined as if under cross-examination, either orally or by deposition, like any other witness.”

There appears to be no other section of the code which has any bearing on this point.

Wigmore, Evidence, Article II, p. 376, Section 1702, says:

“The party-opponent in a civil case is not, as such, privileged to withhold any facts.”

And on p. 377, Section 1704, Par. (b), he says:

“This rule includes the inspection of the opponent's body, by the jury or by witnesses, under conditions prescribed by order of the trial judge or by standing rules of court, and in all issues where some fact concerning the person's body is relevant.”

The Supreme Court of the state, in the case of *Miami & M. Tpk. Co. v. Baily*, 37 Ohio St., 104, laid down this rule in the first paragraph of the syllabus:

“In an action to recover for personal injuries, caused by the negligence of the defendant, the court has power to require the plaintiff to submit his person to an examination by physicians or surgeons, when necessary to ascertain the nature and extent of the injury.”

No authority is cited for the rule laid down by the court in this case.

It appears to the court that the defendant may be placed at a great disadvantage if he is precluded from securing evidence, if he can, to support the averments of his answer as to the physical condition of the plaintiff. This condition can only be known

to a physician and surgeon skilled in their profession and after a thorough examination; and perhaps even in that case it may be difficult or impossible for a physician or surgeon to state positively the permanency of any physical defects that may exist, if there be such, in the plaintiff's person.

Counsel for the plaintiff have cited three cases in support of their contention that the order asked for in this case should not be made, but it appears to the court that these cases do not support the contention of counsel for the plaintiff.

In *Devanbagh v. Devanbagh*, 5 Paige (N. Y.), 553, the court, on page 557, says, in reference to this matter:

"I have no doubt as to the power of this court to compel the parties, in such a suit, to submit to a surgical examination, whenever it is necessary to ascertain facts which are essential to the proper decision of the cause."

But in this case the court found that the party, a lady, had submitted to several examinations, and the physicians and surgeons who made the examinations were not disqualified to testify. The court found that she had been sufficiently examined by competent surgeons, whose testimony could be obtained by the plaintiff to show that her physical incapacity was incurable.

Now in the case at bar, it does not appear that the plaintiff has been examined by physicians and surgeons, whose testimony can be secured, because they can claim privilege.

In the case of *Louisville & N. Ry. v. McClain*, 23 Ky. L. Rep., 1878, cited by counsel for plaintiff, the court held that inasmuch as the plaintiff has been fully examined by two surgeons of the defendant at the time of the injury complained of, or shortly thereafter, and was examined by three other physicians, at different times, and there was little conflict in the testimony of the five physicians, there was no substantial error in overruling the defendant's motion for a personal examination at the time of the trial. But the court in this case recognized the right of the trial court to require the plaintiff to submit to a physical, medical and surgical examination. The court stated that it was in the discretion of the court whether or not an examination should be ordered.



1912.]

Sucher v. Burger.

The case of *Western Glass Mfg. Co. v. Schoeninger*, 42 Col., 357, is another case cited by counsel for plaintiff and was decided by the Supreme Court of Colorado. In that case it was held that the court has discretionary power reviewable on appeal, to compel the plaintiff in an action for personal injuries to submit to a physical examination. It further held that it is an abuse of discretion of the court, calling for reversal, for the trial court to refuse to order a physical examination of a plaintiff who alleges permanent injury, where the accident was of such a nature as to produce no visible wound, etc.

Numerous authorities are cited in the foot notes of this case in support of the proposition that the power to order a party to submit to a physical examination is in the discretion of the court, and that an abuse of the discretion is reviewable error.

The nature of this evidence sought by the defendant in the case at bar, can not be elicited in any other way than by a physical examination of the plaintiff, and the person who makes this examination should be in a position to be able to testify as to the physical condition without objection from counsel for the plaintiff. It does not appear that any physician or surgeon is in such a position at this time and, therefore, the court is of the opinion, that in the exercise of a sound discretion, this motion should be granted.

**DANGEROUS BRAKE DEVICE.**

Superior Court of Cincinnati.

MAY M. REIS V. CINCINNATI TRACTION COMPANY.

Decided, February, 1912.

*Negligence—Street Railways—Lady's Dress Caught on Projection of Brake Device and She Was Thrown to the Street—Approved Devices which are Nevertheless Dangerous.*

In an action against a traction company for injuries to a passenger who was thrown to the pavement by the catching of her dress on a brake device, evidence that the device was located and maintained in a manner which would easily be recognized as dangerous and improper by reasonably prudent officials and operatives is sufficient to send the case to the jury, notwithstanding there was no defect in the apparatus but it was admitted to be approved and standard construction.

*Spencer Jones*, for plaintiff.

*Rufus B. Smith* and *Charles A. Groom*, contra.

HOFFHEIMER, J.

Memorandum on motion for new trial.

Plaintiff was injured while alighting from one of defendant's cars. Her skirts caught upon an iron cap or cylinder located directly under the place where she had been seated. As she endeavored to step down, by reason of the catching of her skirt, she was caused to fall. The precise claim in the petition is: "that in said summer car and through the floor thereof, projected an iron cylinder which was part of said car. That said cylinder so projecting was in close proximity to the western side of said car and its position with reference to the passage-way and seats while said car was going from Vine street toward Mc-Millan street, was immediately under the front edge of the seat and at the edge of the passage-way between the rows of seats. That said projecting iron cylinder was dangerous and improper in that same was liable to catch and hold the clothes of passengers attempting to leave said car, causing them to fall; and

1912.]

Reis v. Traction Co.

said cylinder was in this way and at the time of the grievances hereinafter complained of, negligently placed and maintained by defendant company.”

Plaintiff introduced evidence showing the location of the cylinder and showing that plaintiff's skirt caught on same without knowledge on her part, and also evidence tending to show the dangerous character of the device as located by showing a number of similar injuries, to the knowledge of defendant, and by reason of cylinders similarly located.

A motion to take from the jury having been overruled defendant offered evidence to show that this cylinder was part of a brake-device of approved pattern and construction and in known general use by street railway operatives, where cars of such design were operated. Verdict was for plaintiff and defendant moved for a new trial and for dismissal upon the undisputed evidence.

From what has been said it will be seen that the gist of the complaint is not that the brake device of the kind in question was defective, but that same as located and maintained was improper construction and dangerous, and that the danger was such as would be apprehended by reasonably prudent street railway operatives. Proof of the physical facts from which the jury might infer that the cylinder as maintained was dangerous, supplemented as it was by evidence tending to show the dangerous character of the thing as located, that is, proof of similar injuries, was held by the court sufficient to send this question to the jury. See *Chartrand v. Southern Ry. Co.*, 57 Mo. App., 425; *Dongan v. Champlain Trans. Co.*, 56 N. Y., 1.

Unless the court erred in such regard, then the mere fact that defendant offered evidence tending to show that the cylinder was the best approved construction in known general use by street railway operatives, which evidence was not rebutted by any direct evidence on plaintiff's part, would not warrant either a new trial or dismissal. While evidence such as defendant offered tends to prove that the legal standard of car has been complied with, nevertheless it is not conclusive of it, but is to be considered and weighed together with all the evidence in

the case. 1 *Wigmore on Evidence*, Section 461. The cases of *Farley v. Traction Co.*, 132 Pa. St., 58, and *Smith v. Kingston*, 55 App. Div., 143, to which the court has been cited, do not warrant a contrary view, as I read them.

In *Farley v. Traction Company*, the thing complained of was not likely to catch the clothes of unsuspecting passengers and thus dangerous, but on the contrary, it appears, that in said case, the plaintiff stumbled over something in plain view and "took no care as to his movements and hence stumbled over a conspicuous part of the car." (P. 62.) And there was no evidence, as here, tending to show "that the car as constructed would inevitably produce danger and injury to those using it." (P. 59.)

In *Smith v. Kingston*, inasmuch as the case was barren of evidence tending to show or from which it might be inferred that a safer car existed, and because it also appeared that the appliance was approved by the best makers, the court (Parker, C. E.) held, that the court below erred in submitting the question of improper construction to the jury. This ruling I find was itself reversed in *Smith v. Kingston*, 169 N. Y., 66 (Parker, Alton B., and others concurring) and the trial court was affirmed. Negatively, therefore, these cases would seem to sustain, rather than to oppose the view taken by me upon the trial of the instant case.

For the reasons given, the motion of defendant must be overruled.

1912.]

Prather v. Presbyterian Society.

**COMPENSATION TO ATTORNEYS REPRESENTING A  
RELIGIOUS SOCIETY.**

Common Pleas Court of Hamilton County.

WM. W. PRATHER V. FIRST PRESBYTERIAN SOCIETY.

Decided, June 25, 1912.

*Excessive Verdict—Power of Trial Court With Respect to—Remittitur—  
Counsel Fees—Where an Unnecessary Amount of Labor Was Per-  
formed—Difficulty in Obtaining Testimony of Attorneys Against  
the Claim of an Attorney for Services—Legal Ethics.*

1. There resides in a trial court, in furtherance of justice and due administration of the law and regardless of the grounds for a new trial set out in the statute, plenary power to grant, in case of an excessive verdict, either a new trial or the option to the plaintiff of accepting a remittitur.
2. Where, in an action affecting the title to church property, the record discloses that the judgment as entered in favor of the church was based upon well settled law of this state, a court in a subsequent action to fix compensation to counsel for the church, will note the fact that said counsel brought into the case many features and performed a great amount of labor for which no occasion existed.
3. Furthermore, in view of the difficulty of obtaining testimony from attorneys calculated to reduce the amount claimed by a brother attorney for services rendered, a court will not be entirely governed, in an action to recover counsel fees, by the fact that certain attorneys testified that said services were worth a very large sum, and no testimony by attorneys was offered in opposition thereto.
4. Where the testimony goes to show that the time consumed by two attorneys in and about a case in which they were employed, although covering three and one-half years, did not amount to more than one hundred and fifty days, a verdict for \$15,000 in their favor, which must be paid by a religious society, will be regarded as excessive, and a new trial will be granted in the event the plaintiffs refuse to accept a remittitur of \$5,000.

*A. B. Benedict*, for Wm. W. Prather.

*Otis H. Fisk*, for Sanford Brown.

*Thornton M. Hinkle* and *C. D. Robertson*, for First Presbyterian Society.

GORMAN, J.

On motion for a new trial.

This is an action begun by the plaintiff, Wm. W. Prather, to recover \$14,200 claimed to be due from the defendant, the First Presbyterian Society, for legal services rendered by plaintiff to the defendant between the dates of February 26, 1907, and January 17, 1911, in case No. 53105, in the Superior Court of Cincinnati, entitled "First Presbyterian Society of Cincinnati v. Geo. E. Markley et al," in and about the controversies, questions, issues, business and matters in said case concerning and relating thereto, and in and about perfecting and confirming and protecting and quieting the title of defendant to certain church property on East Fourth street in the city of Cincinnati.

The defendant, by its answer, admits that legal services in some of the matters referred to in the petition were rendered by the plaintiff, but avers that they were rendered jointly by plaintiff and one Sanford Brown, also an attorney, under a joint employment of the two for that purpose. It also avers, in its answer, that its title to said property is that of trustee only, for religious and charitable uses of an ecclesiastical body known as the First Presbyterian Church in Cincinnati. Defendant further avers that the plaintiff, though duly requested, has refused to render a bill or statement showing the particulars of the services he claims to have rendered and his charges therefor. The defendant further avers that Sanford Brown is a necessary party plaintiff to this cause in order that the defendant's liability, if any, and the amount, if any, due to said plaintiff and Brown under said joint employment may be settled in one suit, and avers that a complete determination of the matters and issues involved herein can not be had with justice to this defendant without the presence of said Sanford Brown. Defendant further avers that it is, and always has been ready and willing to pay the balance, if any, due of the reasonable value of said services when agreed upon with both said attorneys; and it avers that it has paid them \$1,300 on account thereof, but they have refused to act together jointly in fixing the balance claimed to be due therefor.

1912.]

Prather v. Presbyterian Society.

Defendant asks that plaintiff be required to make the said Sanford Brown a party herein, and the amount, if any, in which it is indebted to said attorneys, or either of them, be ascertained, and that it be thereupon dismissed with its costs, and for such other relief as it may be entitled to.

Thereupon said Sanford Brown was made a party to this cause, and filed answer and cross-petition and an amended answer and cross-petition, setting up his connection with the case. A reply was filed to his answer and cross-petition by the plaintiff, and also a reply by the defendant thereto.

Brown in substance sets up that he was the regular attorney for and of the defendant society; that during the months of May and June, 1906, and thereafter, an attempt was made by certain persons to unite or merge the defendant society with the Second Presbyterian Church and Society of the city of Cincinnati, and also the Central Presbyterian Church and Society; that said attempted merger by Presbytery of the city of Cincinnati was contrary to the law of the Presbyterian Church, and contrary to the law in the state of Ohio; and that certain persons known as the Trustees of the Presbyterian Church of the Covenant, of the city of Cincinnati, claiming to be a church composed of the First, Second and Central Presbyterian Churches and Societies of the city of Cincinnati, threatened to take possession of the defendant society's property on East Fourth street, and threatened to exclude the trustees of the defendant society from the control and management of said property; and thereupon he was requested to recommend some attorney to assist him in defending the defendant society and its property and property rights in said matter; that he recommended the plaintiff, Wm. W. Prather; and that he and said Prather were employed by the trustees of the defendant society to protect its property and property rights, and protect the possession of the trustees of the defendant's society.

Said Sanford Brown further avers that a suit was brought in the Superior Court of Cincinnati, No. 53105, against the Trustees of the Presbyterian Church of the Covenant and others to enjoin and restrain them from interfering with the defendant

society and its property and property rights; that upon the final hearing of said cause before the Hon. Harry Hoffheimer, Judge of the Superior Court of Cincinnati, the contention of the defendant society was sustained, and that the said parties were perpetually enjoined from interfering with the defendant society's property and its possession thereof and its property rights in said church property on East Fourth street; and that said cause was finally terminated and ended, and no error was prosecuted from the decision of said judge of the Superior Court of Cincinnati.

Said Brown claims that the reasonable value of his services is \$10,000, and that he had been paid the sum of \$500, leaving a balance due him of \$9,500. He further avers that at the termination of said litigation in the Superior Court of Cincinnati, he came to an agreement with the defendant society to pay him for all of his services the sum of \$5,000. He further avers that he rendered services for a period of six or seven months prior to the time when plaintiff was employed, and that said agreed price of \$5,000 was to be in full compensation for all his services rendered jointly with plaintiff and for the separate services rendered by him prior to the employment of said Prather.

The defendant society, by reply, denies that it had agreed to pay said Brown the sum of \$5,000; but avers that it had tentatively agreed to pay said sum providing said Prather, plaintiff, would also accept an equal amount, but that said Prather refused to settle for his share of the services upon the basis to be paid to said Brown.

The case was tried to the court and jury, and occupied almost three weeks. There was a joint verdict rendered for plaintiff and Sanford Brown in the sum of \$15,000. The evidence adduced on the trial showed that during the progress of the case in the Superior Court of Cincinnati, from time to time there was paid by the defendant society to the plaintiff and Sanford Brown various sums of money aggregating \$800 to Prather and \$500 to Brown, or a total of \$1,300. If this sum be added to the amount of the verdict, the total allowance to counsel for their legal services in this case would be \$16,300.



1912.]

Prather v. Presbyterian Society.

A motion for a new trial is now interposed by the defendant society, and almost all the grounds stated in the statute are set out as grounds for a new trial. The principal grounds relied upon, however, by counsel for the defendant society are: that the verdict is not sustained by sufficient evidence; that the damages given are excessive; that excessive damages were given under the influence of passion and prejudice; error in refusing to give the special charges requested by the defendant; and error in admitting evidence offered by the plaintiff and Brown; and error in rejecting evidence offered by the defendant society.

As to the alleged error in the admission or rejection of evidence, the court is of the opinion that while a great mass of evidence was admitted which might properly have been excluded in the way of exhibits, pamphlets, notes of counsel taken in the preparation of the superior court case and a great number of other exhibits, nevertheless the admission or exclusion of this evidence, we think, rested in the sound discretion of the court, and we do not believe that the admission or rejection of this class of evidence materially affected or influenced the jury in arriving at their verdict.

It is possible and perhaps probable that the giving of the special charges requested by plaintiff and Sanford Brown, and the failure to give other charges requested by the defendant society, may have materially influenced or affected the jury in arriving at their verdict. The special charge relating to the character of the church property, that it was trust property and held upon trust for religious, charitable and educational purposes, might have been such error as prejudiced the defendant society; but the court is not disposed to consider the motion for a new trial or grant the same on account of any errors that may have been committed in these particulars.

Great stress is laid by counsel for the defendant upon the claim that the damages are excessive, and that the verdict is not sustained by sufficient evidence. Under Section 11576 of the General Code, Subdivisions 4 and 5, a new trial may be granted for the following causes affecting materially the substantial rights of the party making the motion for a new trial: excessive

damages, appearing to have been given under the influence of passion or prejudice, and when the action is upon a contract, whether the verdict be too large or too small.

It is claimed by counsel for the plaintiff, Prather, and Sanford Brown, that the court can not grant a new trial on the ground of the excessive amount of the verdict unless it be found that the verdict is not only excessive but appears to have been given under the influence of passion or prejudice, or unless it be found that there was some error in the amount of the recovery, whether too large or too small, under Subdivision 5 of the above cited section of the General Code.

Counsel for the defendant society contend that the authorities warrant the court in not only granting a new trial where the damages are excessive, but that the court may, as a condition upon which a new trial will not be granted, make a remittitur of the excessive amount of the verdict.

It is claimed that under Subdivision 4 of the above cited section, there is no power in the court to grant a remittitur, but only power to grant a new trial if it be found that the verdict is excessive and appears to have been rendered under the influence of passion or prejudice. It is further contended that error in the computation of the amount of the recovery is the only ground upon which a remittitur can be made under Subdivision 5 of the above cited section.

The court has examined the authorities cited by counsel on both sides as to this question, and is of the opinion that a remittitur may be granted in the case of an excessive verdict, even though it does not appear to have been given under the influence of prejudice or passion. The following authorities, we think, fully sustain the court in this position:

*Pendleton St. Ry. Co. v. Rahmann*, 22 Ohio St., 446: This was an action to recover damages for personal injuries caused by the negligence of the street railway company, and the court upon a motion for a new trial being argued, overruled the same on condition that the plaintiff would submit to a remittitur of \$5,000 from the verdict, the verdict having been \$10,000 in the case. It was claimed that the court had no power to grant a re-

1912.]

Prather v. Presbyterian Society.

mittitur, because it did not appear that the damages were excessive and given under the influence of passion or prejudice. The Supreme Court in the syllabus of the case uses this language:

“Where the damages assessed by a jury are excessive, but not in a degree to necessarily imply the influence of passion or prejudice in their finding, the court, in the exercise of a sound discretion, may make the remittitur of the excess the condition of refusing to grant a new trial.”

This rule is amply and fully sustained in the following cases: *American Contracting Co. v. Sammon*, 6 C.C.(N.S.), 121, 4th Syllabus; *Ch., V. & T. R. R. Co. v. Shannon*, 4th C. C., 449, 3d Syl.; *Sibila v. Bahney*, 34 O. S., 399, page 410; *Carl v. Pierce*, 20 C. C., 68, 4th Syl.; *Wabash R. R. Co. v. Fox*, 20 C. C., 440.

And it was held in the case of *Brenzinger v. The American Exchange Bank of Duluth*, 19th C. C., page 536, that the trial court is not confined to the statutory grounds in granting or overruling a motion for a new trial, but that in the interests of substantial justice, if the verdict appears excessive or not supported by sufficient evidence, the trial court has the power, regardless of the grounds set out in the statute, to grant a new trial.

In the case of *The Light Company v. Mason*, 81 Ohio State, 463, it was said by Judge Summers deciding the case:

“It seems to have been assumed in some cases that at common law, in an action for damages, sounding in tort, the court might set aside the verdict of a jury when it was so excessive that it appeared to have been influenced by passion or prejudice, but that it was powerless to disturb one that was inadequate. The fact was, however, and the doctrine now generally accepted is, that the verdict of a jury is subject to the supervision of the court whether too large or too small.”

The court in this case cites with approval and adopts the rule therein laid down, the case of *Phillips v. London & Southwestern Ry. Co.* (1879), 5 Q. B., 78, in which James, L. J., in the court of appeals uses this language :

“Still the verdicts of juries as to the amount of damages are subject, and must, for the sake of justice be subject to the supervision of a court of first instance, and if necessary of a court of appeals in this way—that is to say—if in the judgment of the

court the damages are unreasonably large or unreasonably small, then the court is bound to send the matter for a reconsideration by another jury."

Upon these authorities, the court has no doubt that there resides in the trial court plenary power, regardless of the grounds set out in the statute, in furtherance of justice and in the due administration of the law to grant a new trial, or as a condition for overruling the motion, grant a remittitur in cases of excessive verdicts. Courts are instituted to administer justice and to correct verdicts of juries and the abuses of the powers of juries where injustice is done, and to that end it would appear that the courts are vested with inherent power under the common law to protect themselves from pronouncing unjust judgments and thus prevent the recording of unjust judgments based upon excessive or inadequate verdicts.

In this case a great amount of evidence was introduced consisting of exhibits, notes made by counsel in the trial of the superior court case, the memoranda of authorities examined by them, and extracts from the memoranda of the records of the county recorder's office and from the law of the Presbyterian church, and all was apparently produced and offered with a studied effort to magnify the efforts which had been put forth by plaintiff and Brown in the superior court case. Many of these exhibits and much of this evidence was excluded, but that which was admitted and that which was offered in the presence of the jury could have had no other effect than to impress the jury with the magnitude of the labors performed by Prather and Brown in the superior court case. Copious notes upon decisions, ecclesiastical and civil, opinions of clergymen upon Presbyterian law, digests of the Presbyterian law, the constitution and catechism of the Presbyterian church, and numerous other papers and records were offered or admitted in evidence for the purpose of showing the amount of labor performed by counsel in the superior court case. It was claimed by plaintiff and Sanford Brown, that they had studied the Presbyterian law back to 1729, the date of the promulgation of the Westminster Confession of Faith; that they had familiarized themselves with Pres-

1912.]

Prather v. Presbyterian Society.

byterianism as laid down by John Calvin and John Knox; had studied the Short and Long Catechism; carefully gone over all of the cases decided by the Presbytery, the Synod and the General Assembly of the Presbyterian Church for more than a hundred years; had examined the title to the church property on East Fourth street back to the days of John Cleves Symmes and of the days of the founding of the city of Cincinnati; but what useful purpose could have been subserved by this vast amount of labor the court is unable to comprehend. There was a painful and lengthened recital by the plaintiff and Sanford Brown of the days and nights of toil and the burning of the midnight oil, the worry and the stress of mind, and the annoyance, solicitude and bother with trustees of the defendant's society, the ministers interested in the case and the members of the First Presbyterian Church, extending over a period of more than three years and a half during the pendency of this case, and the court could not help but feel, during the recital of this testimony, that the evident purpose thereof was to impress the jury with the magnitude of the task which these counsel had undertaken and performed. It was stated that deep research was made by counsel into the doctrine of Presbyterianism and the authorities bearing upon church cases; conferences were had and advice given to the clergy of the church who were aiding them before the Synod and the General Assembly of the church; and a vast number of difficulties encountered with opposing counsel in the effort to preserve the rights of the defendant's society. Almost every scrap of paper containing a memorandum or notation made in connection with the case was brought into court and offered or admitted in evidence, the manifest purpose of which was to swell the evidence before the jury.

There were also called upon the witness stand several attorneys of high standing at this bar as experts to testify and give their opinion of the reasonable value of Prather's and Brown's services. A lengthy hypothetical question was put to them, involved and complicated, a great part thereof unnecessary, and requiring two and a half hours to read, evidently prepared at great pains, and with a purpose to impress the jury as

much as the witnesses with the tremendous amount of labor expended by counsel, the difficulties and novelties of the questions involved, and the great value of the church property, estimated at from \$350,000 to \$400,000, and claimed in the hypothetical question to have been saved to the defendant's society by the efforts of plaintiff and Brown.

Many other incidents of the trial might be cited to show that the great part of the time of the court and jury in the trial of this case was taken up with hearing a recital of what counsel did in the preparation of the pleadings, the research work, the preparation of the law of their case, and the collection of evidence, the vast amount of which, in the opinion of the court, was wholly unnecessary, the great amount of time spent before the special master and in the court and in the preparation of the pamphlets or briefs which were submitted to the Presbyterian Synod and General Assembly, and the trial briefs before Judge Hoffheimer of the superior court.

In the superior court case there were two questions involved. It was proposed to merge or unite and in fact the Presbytery had decided that there was a merger and union of the First, Second and Central Presbyterian Churches. Now the First Presbyterian Society had submitted to it a proposition to merge or unite with the Second Presbyterian Society and Church. No proposition was ever submitted either to the First Presbyterian Church or to the First Presbyterian Society to merge or unite with the Central Presbyterian Church or Society. The law of the state of Ohio provides that there may be a merger of religious societies or corporations upon a two-thirds vote in favor thereof by each or all of the religious societies proposed to be merged. The law of the Presbyterian Church provided that there could be a merger or union of two or more congregations upon the request for such a union or merger by a majority of the members of the congregations. In the case in the superior court tried before Judge Hoffheimer, there never was a request made by the First Presbyterian congregation for a union with the Second and Central Presbyterian congregations, and therefore under the law of the church, there could have been no union

1912.]

Prather v. Presbyterian Society.

or merger of these congregations. There never was a two-thirds vote by the members of the First Presbyterian Society to merge with the Second Presbyterian Society and Church or the Central Presbyterian Society and Church, or any other Presbyterian society and church, therefore under the law of the state of Ohio there could not have been a merger of the First Presbyterian Society with any other religious society.

The title of the First Presbyterian Society to its church property on East Fourth street was not involved in this controversy, and if it had been involved, the title to this property has been settled beyond the peradventure of a doubt to be vested in the First Presbyterian Society by two decisions of the Supreme Court of this state, which every young lawyer admitted to the bar knows or ought to know. The cases of *The Lessees of the City of Cincinnati v. The First Presbyterian Church*, 8th Ohio Rep., 298, and the case of *Williams v. The First Presbyterian Society of Cincinnati*, 1st Ohio State Reports, 478, both of which are leading cases in the state of Ohio, leave no room for question as to the validity of the title of the defendant society to its church property on East Fourth street.

The total time consumed in the preparation, in the taking of testimony, preparing the pleadings, and the taking of evidence before the special master, the presentation of the same before Judge Hoffheimer, the argument of the case, and all other time employed by counsel after their joint employment on February 26, 1907, according to plaintiff's and Brown's testimony, although extending over a period of three and a half years was not more than 150 days. The evidence further discloses that Brown, before Prather was employed in the case, had made extensive investigation of the facts and the law, and was able and did present to plaintiff the facts and the law which enabled him and Brown to prepare the petition in their case in the superior court covering forty-five typewritten pages. The evidence further discloses that Brown was the regular attorney for the defendant's society, and it was through his good offices and friendship for plaintiff that he was called into the case upon Brown's recommendation. Brown and Prather jointly prepared the res-



olution for their joint employment and procured the trustees of the defendant society to adopt it and spread it upon their minutes. No sum was mentioned as compensation for the services to be rendered, but I think it may be safely stated, in view of the character of the defendant society, in view of the property which it held and the uses to which it was devoted, the fact that the trustees had no personal interest in the property, and the questions to be determined by the court, and the status of the parties, that the sum of \$5,000 if offered at that time, would have been accepted with alacrity as full and fair compensation for the services which should have been performed.

It must not be forgotten that the defendant society was in possession of its property, and no person or persons, corporation or society could dispossess it without due process of law. The defendant society and its trustees, upon a demand being made to give up their property and surrender the possession to the Trustees of the Church of the Covenant, or upon a demand by the Presbytery, the Synod or the General Assembly of the Presbyterian Church, could very well have refused, and it would have been incumbent upon those who claimed the right to the possession of the property to bring an action to dispossess them. It seems to the court that the proper advice for counsel to have given to the defendant society's trustees at the time this injunction suit was brought, was to have ignored any demand upon them to surrender their property, the possession or control thereof, and compel those who were claiming the property to be the aggressors.

The testimony of expert attorneys as to the value of the services of plaintiff and Sanford Brown in the superior court case ranged from \$25,000 to \$40,000. There was an absence of attorneys to testify on behalf of the defendant society. While it may not be known generally, it is well known to the court that it is next to impossible to procure an attorney to testify against another attorney in a claim made by him for his fees. The species of free-masonry which exists among professional men, whether lawyers, doctors, engineers or men of any other calling or profession, seems to influence them and deter them from tes-



1912.]

Prather v. Presbyterian Society.

tifying against their fellow-members whenever a matter of their fees is involved. It is easy to secure the testimony of an attorney to testify as to the reasonable value of another attorney's fees, and the public generally have come to look with distrust and disfavor upon the legal profession because of this attitude on the part of the attorneys and their disposition to aid one another in securing as much fees as it is possible to secure from the client. Many attorneys act upon the principle of the French Minister, Colbert, who in the matter of taxation always endeavored to pluck as many feathers off the goose as he could possibly pluck, without making the goose squeal. It is greatly to be deplored that there were no attorneys at this bar who were willing and ready to come forward and testify as to the reasonable value of these services on behalf of defendant society. Those men who have testified to the very large amount which they have set as the reasonable value of plaintiff's and Brown's services have not, in the opinion of the court, added anything to their reputations as members of this bar, nor have they, by their conduct, tended to allay the public feeling that does exist against the legal profession. The canons of ethics adopted by the American Bar Association is one to be commended to all practicing attorneys at this bar, and it appears to the court that if these canons had been kept more in mind by plaintiff and Sanford Brown and by the attorneys who testified on their behalf as to the reasonable value of their services, there would in all probability be no question of a new trial in this case and perhaps there would have been no trial whatsoever.

It appeared in evidence that Sanford Brown proposed to accept for all of his services covering a period of more than six months longer than that rendered by Prather, the sum of \$5,000, and that the defendant's society, through its trustees, appeared to be willing and ready to pay him that amount for his services provided Prather would settle for a like amount or even a somewhat larger amount, but the plaintiff immediately upon the termination of the litigation in the superior court, fixed the value of his service at \$15,000, apparently without any consultation with his associate, Sanford Brown, disregarding entirely

the courtesy that he owed to Brown in view of the fact that Brown had brought him into the case. Plaintiff declined and refused to meet with the trustees of the defendant's society in an effort to adjust these fees, but referred them to his attorney. He never rendered any bill for his services but stood upon the ground that his services were worth \$15,000; that sum should be paid or the defendant society would face a lawsuit.

As heretofore stated, the court can not but believe that an offer of \$5,000 for the performance of all these services, if made before Prather and Brown were employed, would not have been refused but would have been considered not only by them but by any other lawyer of high standing at this bar as a large fee for the services which were necessary to be performed for the protection of the defendant society and its property.

When learned attorneys as experts testify as to the reasonable value of the services in like cases at this bar, it is the opinion of the court that there were very few cases of like character tried or heard at this bar in the last twenty-five or thirty years. The only case which the court can call to mind was that of Kittredge & Wilby against Armstrong, receiver, tried twenty years ago in the Superior Court of Cincinnati, where plaintiff in that case recovered a judgment of \$18,000 with interest, aggregating \$19,964.58, for services rendered to Armstrong, receiver of the Fidelity National Bank, wherein these attorneys recovered a judgment against the directors of the Fidelity National Bank in the sum of \$450,000 and brought to the receiver the entire amount of the judgment, \$450,000. The results to the client in that case were so much greater than any possible results that could inure to the benefit of defendant society in this case; the standing of the lawyers in that case at this bar was at least as great as that of the plaintiff and Sanford Brown in this case; the difficulties of the case which Messrs. Kittredge & Wilby had to contend against; and the great financial benefit resulting to their client, the receiver, were such that if a like result had been produced in this case, there might be some claim made that the verdict is not excessive.

It must not be forgotten that attorneys at law are officers of the court, and that it is the duty of the court to protect itself

1912.]

Prather v. Presbyterian Society.

and also protect litigants against any unjust or unconscionable charges made by these officers of the court. Formerly attorneys were not permitted to charge for their services, and in England now attorneys are not permitted to charge for their services, but accept whatever honorarium or gratuity may be given to them by their clients. The right to charge is a privilege given by the state of Ohio to attorneys at law in consideration of the services which they render in aiding the court in the administration of justice. It is also known to the court that the salaries paid to judges range from \$6,000 in the court of common pleas and the circuit court to \$6,500 to the judges of the Supreme Court, the highest judicial tribunal in the state, for one year's services; and in addition thereto, those who take a seat upon the bench are prohibited from practicing law and are required to give up all their clientage and devote their entire time to the administration of justice. Will it be claimed for a moment that five month's services by attorneys in the preparation and trial of a case is worth two and a half times as much as the entire yearly salary of a judge of the court of common pleas or of the superior court? In this case, it does not appear but that Prather and Brown also attended to other matters for other clients during the time that they were preparing and trying the case before Judge Hoffheimer. It does not appear that they lost any other business by reason of devoting their time to this case for which they ask compensation, and it is fair to presume that if either or both of them had any clientage whatsoever, they must have made an additional sum during the time that this case was pending.

The court of common pleas in partition cases has fixed a rule allowing counsel fees to the attorney who brings a suit in partition upon the theory that he has rendered services for the benefit of all the parties. If there had been a partition case of this church property and it had been sold for \$400,000, the entire fees allowed to the attorneys who would have brought the partition suit would be less than \$2,500. In the probate court of this county, a rule has been adopted allowing counsel fees in cases of sales of real estate. If this property had been sold through the probate court and administered therein, and these

attorneys had acted as counsel in the sale of the property, the court would not have allowed them to exceed \$3,500 or \$4,000.

Among the other canons of ethics adopted by the American Bar Association, it is said that controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self-respect and with his right to receive reasonable compensation for his services; and lawsuits with clients should be resorted to only to prevent injustice, imposition or fraud.

It is claimed in this case by counsel and was claimed in the argument to the jury and in the hypothetical question put to the experts, that counsel fees were contingent or uncertain. The employment did not provide that counsel were to take the case and perform the services contingent upon success. The evidence shows they were paid \$1,300 during the progress of the case, and there is no reasonable ground for claiming that their fees were dependent upon their success. It is true that attorneys employed by any person may not get their fees. That is a risk which they run and which they can avoid, if they desire, at least in part, by demanding and receiving retainers.

In this case, the court has fully considered all the matters involved in the case; has fully considered the nature of the controversy involved in the superior court case; has read fully and considered the very able, exhaustive and conclusive decision of the very learned judge of the superior court who rendered the same, Judge Hoffheimer; the court has considered the fact that the plaintiff and Sanford Brown are officers of this court, and that the court himself has some knowledge of the reasonable value of counsel fees; he has considered the character of the property, that it is a quasi-public trust for religious, charitable and educational uses; that while it is not a public charity in the full sense of the word, nevertheless the church property on East Fourth street is for the use and benefit of every person who desires to become a member of the church or a pewholder, or a contributor to the support of the church, whether he be a Presbyterian or not; that the defendant society's property is devoted to the elevation of morals, to the propagation of relig-

1912.]

Prather v. Presbyterian Society.

ion, and to the cultivation, to some extent at least, of education and not only among its members but others who come within the pale of its influence. The court has also considered the fact that the trustees of the defendant society are merely trustees and have no personal, financial interest in this property, and could not devote the property to any other use than religious, charitable and educational purposes. The court has also considered that attorneys owe a public duty to the court and to the public to aid in the administration of justice, and that while the laborer is worthy of his hire, nevertheless it must be borne in mind that the law is a profession whose basis is public service; that it exists to promote justice and to facilitate the action of courts of justice; that it is not a money-making profession, nor was it ever intended to be such.

The court has also to keep in mind the reasonable amount that should be charged for similar services in similar cases, and upon the whole, while the court is not disposed to find fault with the jury because of the verdict which they rendered in view of the extraordinary character of the trial and the testimony produced, nevertheless the court is of the opinion that this verdict is excessive and that while it may not appear to have been rendered under the influence of passion or prejudice, it is so great that the court can not in good conscience allow a judgment to be entered thereon. This conclusion is arrived at without regard to the court's personal feelings or the relationship of the plaintiff and Sanford Brown to the court, but with the sole thought in mind that it is his duty under his oath of office as he understands it, not to permit an injustice to be done if it can be averted.

The defendant society has not the means to pay this verdict. Whatever sum shall be paid to plaintiff and Brown for their services must be raised among the members of this religious society either by voluntary contributions, by mortgaging their church property, or by making a loan from some person who is willing to lend money to pay these attorneys' fees.

In view of all the circumstances of this case, I am of the opinion that \$10,000 would be a very large fee to allow to plaintiff

and Sanford Brown jointly for all the services which they have rendered to the defendant society. I can not but feel that if a sincere effort had been made to settle the fees of plaintiff and Brown with the defendant society, from the disposition of the trustees who appeared upon the witness stand, there would have been no occasion for this litigation.

It is the judgment of the court that if the plaintiff and Sanford Brown will accept a remittitur of \$5,000 from this verdict and permit a judgment to be entered in the sum of \$10,000, the motion for a new trial will be overruled; otherwise it will be granted.

---

#### INDEBTEDNESS OF DECEDENT TO HOUSEKEEPER ON NOTES.

Common Pleas Court of Ashland County.

IN RE ESTATE OF J. O. JENNINGS.

Decided, February 24, 1912.

*Estates of Decedents—Promissory Notes Executed to Housekeeper Held Not to Have Been Gifts Without Consideration.*

Promissory notes for specific sums of money, payable one day after date but understood to be payable at the death of the maker, are supported by a good and valuable consideration and may be ordered paid out of the estate of the maker, where it appears that they were executed by him and delivered to his housekeeper to make good to her a reduction in her wages, made necessary by a change in his financial ability.

*Mykrantz & Patterson*, for plaintiff.

*Ford, Snyder & Tilden*, contra.

DEVOR, J.

This matter came into this court on appeal from the Probate Court of Ashland County, from an order allowing two claims of Susan Grindle, one of the executors of the estate of J. O. Jennings, deceased, against said estate. The probate court found that there is due Susan Grindle from the estate of J. O. Jennings

1912.]

Estate of Jennings.

the sum of \$1,360, as set forth in first cause of action, and \$620, as set forth in second cause of action, in all, the sum of \$1,980, with interest thereon from April 3, 1911, and the court ordered said amount paid by said executors out of said estate.

Notice of appeal was given by the residuary legatees under the will of J. O. Jennings, deceased, to-wit: The American Board of Commissioners of Foreign Missions, the Congregational Home Missionary Society, and the American Sunday School Union, and each of them at the time excepted to the judgment of the probate court. The bond in appeal was fixed at \$100, which was duly given.

This case, therefore, was tried in common pleas court upon the application of Susan Grindle filed in probate court for the allowance of said claims and the evidence.

Susan Grindle in her application in the Probate Court of Ashland County, Ohio, sets forth two causes of action. In the first cause of action she sets up a note for \$1,000, dated July 21, 1903, and due one day after date. On said note are the following indorsements:

"Note dated July 21, 1903,	\$1,000.00
Interest to July 21, 1909	360.00
	<hr/>
	\$1,360.00"

"Interest to cease on this note after July 21, 1909."

There are no credits on said note, and no other endorsements, and petitioner represents that she is the owner and holder of said note, and that there is now due and owing to her from the estate of J. O. Jennings, deceased, the sum of \$1,360.

The second cause of action sets up a note calling for \$500, dated April 20, 1905, due one day after date. On said note are the following endorsements:

"Note dated April 20, 1905,	\$500.00
Interest to April 20, 1909,	120.00
	<hr/>
	\$620.00"

"Interest to cease after April 20, 1909."

There are no credits on said note, and no further endorsements and there is due and owing petitioner from the estate of J. O. Jennings the sum of \$620.

Petitioner prays that her claims, amounting to \$1,980, may be ordered paid out of the estate of J. O. Jennings, deceased.

The law of Ohio makes the following provisions in such cases. Section 10727, General Code:

“No part of the assets of the deceased shall be retained by an executor, or administrator, in satisfaction of his own debt or claim, until it has been proved to and allowed by the probate court.”

Section 10728, General Code:

“When an executor or administrator presents a debt or claim to the probate court for its allowance, which he owns, against the estate he represents, amounting to fifty dollars or more, the court must fix a day not less than four weeks nor more than six weeks from its presentation, when the testimony touching it shall be heard. \* \* \* Notice in writing to all the heirs, legatees, or devisees of the decedent interested in the estate, and such creditors as are therein named. \* \* \* All the persons named in the order shall be parties to the proceeding, and any other person having an interest in the estate, may come in and be made a party thereto.”

Section 10729, General Code:

“Exceptions may be taken to a decision of the court upon a matter of law, by any person affected thereby.”

Section 10730, General Code:

“When an executor or administrator asks the allowance of a debt or claim for more than one hundred dollars against the estate of the decedent, an appeal may be taken by any person affected thereby to the common pleas court from an order or judgment of the probate court, allowing or disallowing it, or any part thereof.”

Section 10731, General Code:

“In the common pleas court the matter must be tried and decided the same as if the common pleas had original jurisdiction,



1912.]

Estate of Jennings.

as near as practicable; except that unless the court orders them, pleadings are not to be filed.”

No order was made by the court that pleadings be filed in this case. The court heard the evidence, upon the application of Susan Grindle, filed before the probate court, for the allowance of her claim. There is no issue in the pleadings made upon her application for the allowance of these claims. It is claimed, however, that these notes were gifts payable at J. O. Jennings' death and are void.

The signatures of J. O. Jennings, to these two notes, and the endorsements thereon in his handwriting were proven to be genuine, and admitted by the parties contesting the allowance of this claim.

It appears from the evidence that Susan Grindle was the housekeeper of J. O. Jennings. She lived with him from 1886 up until his death in 1911. She was paid at first for a period of time a larger salary per month for her services, which afterwards was reduced when Mr. Jennings' salary at the First National Bank, of which he was president, was reduced. In order to live within his income, he reduced her salary. She was willing to have her salary reduced at the time. It is not certain when this occurred. Her salary was reduced five dollars per month. She thought that she worked about twenty years at the reduced salary. He paid her regularly and in full for her services under the contract. She never asked to have her salary increased. She thought the note for \$1,000 was given to her the next day after it was written. Her salary was paid right along while Mr. Jennings lived. She said they never had any talk about an increase of salary. She thought the \$500 note might have been given to her a month after it was written. She had these notes in her possession at the time of Mr. Jennings' death. She never received any interest on them, but claims she paid the taxes.

These notes were due one day after date, but the witnesses testify that Mr. Jennings said and it was understood that they were to be paid at his death.

Now, what consideration supports these notes? Were they wholly without consideration and a mere gift? Unless these notes are supported by a consideration they are of no validity in law, and are void. No principle of law is better established than, "The gift of the maker's own note is the delivery of a promise only, and not of the thing promised, and upon the death of the maker, leaving the promise unfulfilled, the gift fails." "Such gift, being without consideration, no recovery can be had on the note, against the executor of the maker." *Starr v. Starr*, 9 Ohio St., 75.

"A gift requires no consideration, and depends upon no agreement, but upon the voluntary act of the donor, and is accomplished by a delivery of the subject of the gift." *Picksley v. Starr*, 149 N. Y., 432.

While there are no pleadings in this case, and no answer filed, setting up a want of consideration for these notes, it is, nevertheless, the duty of Susan Grindle to prove that these notes are valid claims against the estate of J. O. Jennings. The court ought not to allow these claims unless he is convinced that they are valid claims, supported by a valuable consideration. Ordinarily the written promise of a person to pay a certain sum of money is presumed to be for a valuable consideration. This presumption, however, would not apply in proceedings of this kind, and under circumstances such as in this case.

The witness, J. F. McFadden, testified that Mr. Jennings said that these notes were given "To make up a deficiency." "He said at one time they cut his salary in the bank, and he cut Miss Grindle's salary, and this was the deficiency that he thought would make that up at his death." Another witness testified, "He said that he had promised her a certain salary, and when he grew older the bank cut his salary, and he didn't feel he could afford to pay her what he promised her, and he gave her these notes to make up what he couldn't pay her, that is, the salary that he had promised her." The applicant, Susan Grindle, testified on this subject, "When he gave me that note"—referring to the \$1,000 note—"he said he was giving me that to make up the deficiency of my salary between what he had paid me and what

1912.]

Estate of Jennings.

he was paying me then. And, he said when he gave me the \$500 note that he hadn't given me enough for what services I had rendered him, and wanted to give me \$500 more. He gave me these notes for services I rendered to him, taking care of him through a good many sicknesses."

What consideration, does such evidence show, supported these notes? Susan Grindle was employed for a stipulated salary. Then, his salary at the bank was reduced, and he reduced her salary. She agreed to accept the reduction, and he gives these notes to make up the "deficiency." Deficiency means a lack of something; a want; an inadequacy; not sufficient. If Susan Grindle had agreed to work for a certain sum per month could there be a deficiency in her salary?

A contract for services at a specified sum per month can surely be modified or changed by the agreement of the parties, at any time they desire to do so. The services are certainly a valuable consideration for a promise to pay. No one is a better judge of the value of services than the employer, and there is nothing more reasonable than a sensible recognition of such services, by a proper and just compensation for the same, and one way to do so is to pay more than the contract calls for. Holding to the strict letter of the contract, like a Shylock, is not justice, and is sometimes not honest.

Whether Susan Grindle earned any more than J. O. Jennings was paying her the evidence does not show, but it is not particular. J. O. Jennings believed he was not paying her enough for her services, and only because his salary was reduced is the reason he reduced her salary. The consideration for these notes were valuable services as a housekeeper, rendered to J. O. Jennings. He was the best judge of the value of those services. He recognized that her services were worth more, and he surely had a right to pay her more. It was his property. He worked for his money and he had a right to spend it as appeared to him proper. Twenty years equals 240 months and at five dollars a month equals \$1,200.

In his will, J. O. Jennings devised to Susan Grindle his homestead property, all his household goods and personal property in

and about the house, also \$1,000 in money. "All this is given in addition to what I have heretofore paid her, to remunerate her for long devoted faithfulness as my housekeeper." This will bears date of August 5, 1903, a short time after the date of the \$1,000 note. There is no evidence to show that J. O. Jennings intended this provision in his will to take the place of these notes or either one of them.

Two cases of similar nature have been found by the court, and in each of these cases the court found that the note and check were supported by a valuable consideration, and the claims were allowed. In the case of *Barthe v. Lacroix*, 29 La. Ann., 326, the court say:

"We have read all the evidence in this case carefully, and the conclusion we have reached is that the deceased, Lacroix, being without family, and believing that plaintiff had served him long and faithfully, at very small wages, felt that he was under a moral obligation to remunerate him beyond his wages, and executed this \$500 note for that purpose.

"In one sense it was gratuity, i. e., he was under no legal obligation to do so. In another sense, it was the fulfillment of a natural obligation. We think that there was a good and valid consideration for the note. Under this view, it becomes necessary to pass upon the questions raised as to the validity of donations, disguised under the form of onerous contracts."

In the case of *Cox v. Walker*, 140 Ky., 172, the court say:

"There is some evidence that Mrs. Cox paid appellee three dollars a week as fixed compensation for her services, but this circumstance can not be allowed to outweigh the positive statements of Mrs. Cox that she intended to and had given appellee as compensation for her services \$1,000, when coupled with the fact that her services were worth this sum. A careful reading of the record convinces us that the check was given to appellee as compensation for services rendered by her, and so the judgment is affirmed."

So, the finding of the court is, that these notes of Susan Grindle against the estate of J. O. Jennings, deceased, are supported by good and valuable considerations, and that they should be allowed, and paid out of said estate.

1912.]

Shannon v. Shannon.

Judgment entered allowing said claims, and the costs of these proceedings to be paid by the executors of said estate. Exceptions may be noted.

### NATURE OF TITLE OF WIDOW UNDER HUSBAND'S WILL.

Common Pleas Court of Greene County.

FRANK E. SHANNON v. CHARLES SHANNON ET AL.\*

Decided, 1911.

*Wills—Devise of Property to Wife for Life with Power to Sell and Consume is a Devise of a Life Estate Only.*

Under the devise, "I give and bequeath to my wife [naming her] all my estate both real and personal to be used and disposed of by her according to her best judgment, and at her death to be divided equally between our five children," the wife did not take a title in fee simple, but a life estate only, with the right to dispose of and convey for her support or consumption; and the rights of the remaindermen are not affected by a conveyance of the property in trust.

KYLE, J.

The plaintiff in this case brings his action for partition of parts of lots 161 and 162 in the city of Xenia, and avers that he is entitled to the undivided one-fifth part of the same. He claims his title as one of the heirs at law of William Q. Shannon. All the other heirs at law of said William Q. Shannon are made parties defendant.

Charles W. and John R. Shannon file their answer and set forth Item 2 of the will of William Q. Shannon. They further aver that Rebecca A. Shannon, surviving widow of William Q. Shannon, on August 31, 1906, made her conveyance of said premises described in the petition to the two said answering defendants for one dollar and other good and valuable considera-

---

\* Affirmed by the Circuit Court without opinion; Circuit Court affirmed by the Supreme Court without opinion, *Shannon v. Shannon et al*, 85 Ohio State, 456.

tions; that on the same day the said answering defendants, contemporaneously with and in connection with the execution of and delivery of said deed of conveyance to them, executed and delivered a declaration of trust reciting that said conveyance to them was subject to the exclusive use and control of Rebecca A. Shannon during her natural life, and further that they held said premises for the benefit of themselves and of the said Charles W. Shannon, Ella B. Mitchell and Frank E. Shannon, and that they would make a sale of said property at such time and upon such terms and in such manner as to them may seem best for said beneficiaries, their heirs and assigns, and aver that they have been in possession and control of said premises since the death of Rebecca A. Shannon, and they claim that by reason of the terms of the will of said William Q. Shannon and the said conveyance and declaration of trust that the said plaintiff is not entitled to partition.

Item 2 of the will of William Q. Shannon is as follows:

“I give and bequeath to my wife Rebecca A. Shannon, all my estate both real and personal to be used and disposed of by her according to her best judgment, and at her death to be divided equally between our five children, viz.: Charles W. Shannon, John R. Shannon, Mrs. Ella Mitchell, Edward L. Shannon, and Frank E. Shannon, and if any of these children should die before the death of their mother, their share of the estate shall go to their lineal heirs equally, and if no heirs, their share of the estate shall be divided equally between their brothers and sister, and if any of the children are in debt to the estate, that indebtedness shall be deducted from their portion.”

The plaintiff filed his demurrer to the answer of the defendants, and the right of the plaintiff to partition is to be determined upon the admitted allegations of the answer.

Whether or not the plaintiff is entitled to partition as against the allegations of the answer depends upon the construction and effect given to Item 2 of the will of William Q. Shannon, and the effect of the conveyance made by Rebecca A. Shannon.

Several questions are presented for consideration and might be considered in the following order:

1912.]

Shannon v. Shannon.

*First.* What estate or interest did Rebecca A. Shannon take in the real estate in question under Item 2 of the will?

It is contended by the plaintiff that she took a life estate only. It is contended by the defendants that she took a fee simple.

*Second.* If Rebecca A. Shannon only took a life estate what effect is to be given to the conveyance made by her under the powers given her under said will?

It is contended by the plaintiff that the conveyance and declaration of trust are void and have no effect. It is claimed by the defendants that in making said conveyance if Rebecca A. Shannon only took a life estate it came within the powers conferred upon her and is binding upon the property, and that the same is a bar to an action for partition on the part of the plaintiff.

The three leading cases that lay down the doctrines that may be said should govern in this case are to be found in the 19th Ohio State, of *Baxter v. Baxter*, page 490; *Johnson v. Johnson*, 51st Ohio State, 446, and *Home v. Lippardt*, 70 Ohio State, page 261.

According to the views that may be taken of these respective cases hangs the issue of the case under consideration. There is just enough difference between the wills in the cases above referred to and the one under consideration to make the solution somewhat difficult.

In the 70th Ohio State by the terms of the will the wife was given an estate in fee simple "with power to sell or dispose of as she may see fit" and providing further that after the death of the wife what should remain would be distributed in a certain manner. The court held that when an estate is devised with the absolute power of disposal a devise over of what may remain is void, and that, therefore the wife took an absolute title, and the words conferring power to sell or dispose of as she may see fit were words of supererogation and added nothing to the title or interest given to the wife.

The language used in the will under consideration is more like the terms used in the will in the case of *Baxter v. Baxter*, in which case the court held that the wife only took a life estate.

In the construction of a will it is the object to determine and give effect to the intention of the testator. In the will in the item under consideration there are no words of perpetuity used. The will gives Rebecca A. Shannon "all my estate both real and personal to be used and disposed of by her according to her best judgment, and at her death to be equally divided between our five children."

To give effect to all the language used in the will it is apparent that the testator intended that at the death of Rebecca A. Shannon the property was to be equally divided among their five children. Since the bequest to Rebecca A. Shannon included both real and personal, the phrase, "to be used and disposed of by her according to her best judgment" should be construed in the light of that fact.

If Rebecca A. Shannon took a fee her power and right to vest the title in two of the children as trustees, with power to sell at such time as they might see fit, would be unquestioned, and the conveyance in question would defeat plaintiff in his right for partition.

If Rebecca A. Shannon took only a life estate, then her right and the effect of the deed made by her must depend upon the construction of the powers given her in the will.

Every will must be construed upon its face to give effect, if possible, to the intention of the testator. In the light of the authorities I am of the opinion that Rebecca A. Shannon took only a life estate in the property, and did not take a title in fee simple, and that the rule laid down in the case of *Baxter v. Baxter* applies in this case.

The next question for consideration: If she took a life estate only, was the conveyance made by her, as set forth in the answer, within her powers given under the will?

If by the terms of the will she had a right to make a conveyance for her own needs or consumption and support only, the conveyance in question not having that effect would be beyond her power and would be of no validity in law. If the broader view is taken and it is held to mean that she could do anything with respect to the property as she might see fit, and having seen



1912.]

Shannon v. Shannon.

fit to make the deed in question it might bind all the parties hereto and defeat the right of partition.

If, instead of making a deed, Rebecca A. Shannon had seen fit by will to dispose of this property, the question would then be presented as to the rights of the legatees under such will as against the heirs of William Q. Shannon—in the broad sense, a bequest by will would have been a disposition of the property as she might deem best, and if such will were held to be good it would defeat the remaindermen under the will of William Q. Shannon. Instead of relying upon a will Rebecca A. Shannon made such a conveyance into the hands of these trustees, which was in effect a disposition of the property after the termination of her life estate, and if binding in law would operate to the defeat of the plaintiff in his immediate right to the property.

Since Rebecca A. Shannon took under the will it does not seem to me that she should in an indirect way be permitted to defeat or affect the right of the remaindermen in the will under which she took title. If the circuit court were correct in the Kelble case in deducing the right of consumption in the widow by implication under the will which clearly gave her only a life estate by reason of the subsequent bequest of the *unconsumed* residue, the court in this case could read into the will of William Q. Shannon by implication that Rebecca A. Shannon only took a life estate with the power of consumption and could not defeat the rights of the remaindermen; and, therefore, my conclusion is that Rebecca A. Shannon took only a life estate with the right to convey or dispose of for her support or consumption, and that the conveyance set forth in the answer in trust, as set forth in the declaration, was not contemplated within the meaning of the terms of the bequest to her, and is an attempt to defeat the right of the remaindermen and destroy a vested right.

The conveyance and declaration of trust will be held to be of no effect in law, and therefore, the plaintiff is entitled to his right of immediate possession and is entitled to a writ of partition as prayed for in the petition, and the demurrer to the answer will be sustained.

**THE RIGHT TO GIVE BAIL.**

Common Pleas Court of Hamilton County.

STATE OF OHIO, ON THE RELATION OF PHILIP NATHAN, v. CHARLES S. WEYAND, CLERK OF THE POLICE COURT OF CINCINNATI.

Decided, July 24, 1912.

*Sureties—Mandamus Lies to Compel Acceptance of Bail in a Criminal Prosecution—Notwithstanding the Surety is Proposing to go Upon the Bond for Hire—Bill of Rights, Article I, Section 9.*

Where the right to bail exists, the only duty pertaining to the office of one authorized to accept bail relates to the sufficiency of the bond in form and amount, without regard to the character of the proposed surety with respect to his being a professional bondsman.

*Charles S. Sparks*, for the relator.

*John W. Weinig*, Assistant City Solicitor, and *Bernard C. Fox*, Prosecuting Attorney, contra.

DICKSON, J.

The plaintiff, relator, complains that the defendant, a police court clerk, has refused to permit him to be a surety on a bond in said court.

At the hearing it was admitted that the financial responsibility of the plaintiff was ample. The only reason given for the refusal was that the plaintiff was a professional bondsman, i. e., one who was willing and did sign the bonds of accused persons for hire.

Whenever the right to bail exists, the duty to accept is inviolable. The right exists when and because,

“All persons shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great.” (Bill of Rights, Article I, Section 9.)

The presumption of innocence and the right to bail go hand in hand and are twins—and sacred.

The duty in the officer with authority to accept bail begins and ends with the efficiency of the bond in form, and its suffi-

1912.]

State v. Norris.

ciency is pecuniary value. He is not allowed to exercise any discretion as to the reputation, character, morals, standing, politics, religion or color of the signer. He must exercise this duty promptly and without prejudice or favor and impartially—and without fear or influence. When such an officer has acted thus, then only has he done his duty. Any alleged evil arising from accepting the professional bondsman does not concern him. No one signs another's bond without consideration. The consideration is always some form of friendship or money. The stranger within the gate must hire the bondsman. The hired bondsman may be even more worthy than the volunteer—undoubtedly his risk is usually the greater.

The writ will be granted.

---

**LIMITATION IN TIME AS TO PROSECUTIONS FOR  
MISDEMEANOR.**

Common Pleas Court of Licking County.

STATE OF OHIO V. FLOYD NORRIS.

Decided, April Term, 1912.

*Criminal Law—Construction of Section 12381—As to when the Bar of the Statute Falls as to Prosecutions for Misdemeanors.*

The bar of the statute, limiting the prosecution of misdemeanors to three years from the date of the offense, is prevented from falling where a preliminary hearing has been had within the three year period, and a motion to quash an indictment will not lie on the ground that it was not returned until more than three years after the commission of the offense alleged.

*Phil. B. Smythe*, Prosecuting Attorney, for plaintiff.

*B. G. Smythe*, contra.

SEWARD, J. (orally).

A question was raised in this case under Section 12381, that the prosecution of the defendant was barred by the statute of limitations—under the three-year provision of the statute. To

my very great surprise I found this provision in the statute was enacted in about 1845, and it is now substantially as it was then, and it has never been construed or gone before any court at any time as far as I am able to determine. It was amended, but substantially the same provision has been in the statute for a great number of years. It reads as follows:

“A person shall not be indicted or criminally prosecuted for a misdemeanor, the prosecution of which is not specially limited by law, unless such indictment is found, or prosecution commenced, within three years from the time such misdemeanor was committed.”

This indictment was not found within three years from the time the offense was committed, but the defendant was arrested and taken before some officer—either a justice of the peace or the mayor—and was bound over to this court before the expiration of the three years. The question is whether that is a prosecution which saves it from being barred by the statute of limitations.

Suppose that the prosecuting witness had not learned who the person was who committed the offense until just shortly before the three years had expired; that he knew that there was an offense committed, but did not know who committed it; and just before the three years had expired, he should ascertain who committed it and had arrested him under an affidavit filed before the mayor or the justice of the peace, and he was taken before that officer and had a trial, or hearing, and was bound over to the common pleas court; the common pleas court or the grand jury did not meet until after the three-year term had expired, would that be barred by this section of the statute?

The court thinks that the preliminary hearing is a prosecution that would save it from being barred by the statute of limitations. A motion to quash may be considered as filed, and it will be overruled with exceptions.

1912.]

King v. Railway.

**PROXIMATE CAUSE AND LEGAL CAUSE.**

Common Pleas Court of Hamilton County.

FRANK X. KING v. THE PITTSBURGH, CINCINNATI, CHICAGO &  
ST. LOUIS RAILWAY COMPANY, AND THE CINCINNATI  
TRACTION COMPANY.

Decided, 1911.

*Negligence—Jury Should Fix Liability—Where a Chain of Negligent Acts by Different Parties Result in Injury to an Innocent Person.*

The watchman at a steam railway crossing failed to lower the gates upon the approach of a backing train, without a headlight, and only a brakeman's lantern to show its approach. At the same time a street car attempted to pass over the crossing, without the conductor first going forward to see whether the crossing could be safely made. When directly upon the steam railway tracks the street car stopped, and a passenger, seeing the danger impending, sprang from the rear platform and was injured. *Held:*

In an action for damages brought by the injured passenger against both companies, demurrer by the steam railway company will not lie on the ground that the petition fails to allege that the gates were placed not further than fifty feet from the crossing; or on the ground that the proximate cause of the injury was the stopping of the street car on the crossing; but the court will submit to the jury the question whether any or all of the negligent acts complained of contributed to the injury of the plaintiff, and if the jury find only a particular act or acts in the chain of causation produced the injury, that they specify such act or acts.

*Wm. C. McLean*, for plaintiff.

*Maxwell & Ramsey*, contra.

GORMAN, J.

This is a petition to recover damages against the Cincinnati Traction Company and the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, in which the plaintiff alleges that he was injured while riding upon a street car as it was crossing the railroad company's tracks where the same cuts Eastern avenue at what is known as the Rookwood crossing. The petition

averts that the traction company was negligent in this, that its conductor failed to go forward to the middle of the railroad tracks to look out for approaching trains before signalling the motorman to come onto the crossing with his car.

The railroad company is alleged to have been negligent in opening the gates at the Rookwood crossing when the same should have been kept closed because of an approaching train. The railroad company is further averred to have been negligent in backing down a train from the east, upon the west bound track without having a proper headlight thereon and having merely a brakeman's lantern upon the rear of the train.

The defendant traction company is further averred to have been negligent in permitting the car upon which plaintiff was a passenger, to stop upon the railroad tracks, and while so stopping, the railroad company's train descended upon the car from the east as heretofore stated; that as the result of these acts on the part of the defendants, plaintiff upon seeing the approaching train and fearing for his life and safety jumped from the rear of the street car and was injured.

A demurrer is filed to the petition by the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company on the ground that the facts stated in the petition do not constitute a cause of action against the defendant railroad company.

In the oral arguments to the court and in the memorandum brief filed on behalf of the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, its counsel contend that the petition is defective in that it fails to aver that the gates at the Rookwood crossing were placed not farther than fifty feet from the railroad tracks. Counsel for this defendant further argues that these gates on the east side of the crossing were located more than fifty feet away from the railroad tracks.

The court can not consider this matter, as it is *de hors* the record. There is nothing in the petition which discloses that the gates were more than fifty feet from the railroad tracks. Nor is it necessary, in the opinion of the court, that the petition should aver that the gates were within fifty feet of the railroad tracks. It is true that the statute requires a street car

1912.]

King v. Railway.

about to cross a steam railroad track, to be brought to a stop not less than ten feet nor more than fifty feet from the crossing, and that an employe of the street car company shall go forward to look out for approaching trains. But this provision of the statute does not make it obligatory upon the railroad company to maintain its gates within the fifty foot limit. Nor does it follow that the gates might not be lowered upon the approach of a street car, even though they were located more than fifty feet away from the railroad tracks and notwithstanding the fact that the employe of the street car company should go forward to look out for approaching trains.

The court is of the opinion that this question was involved in the case of *Street Railway Company v. Murray*, 53 O. S., 570. This was a case in which Murray was a passenger upon a street car and was killed at the Harrison avenue crossing by a collision of the Baltimore & Ohio Southwestern Railway Company's train with the street car, and in an action brought by his administratrix against both the street railway company and the railroad company, a verdict was returned against both; and all the courts, including the Supreme Court of the state, held that both were liable. The negligence averred in that case against the railroad company was the opening of the gates and inviting the street car to come upon the tracks at a time when there was a train of the Baltimore & Ohio Southwestern Railway Company approaching the crossing so near thereto that it was negligence on the part of the flagman to open the gates and invite the street car to cross. The negligence alleged in that case against the street railway company was the failure of the conductor of the car to go forward to the middle of the track and make an observation for approaching trains. While the question is not discussed in that case it would appear that the courts must have held, of necessity, that both the defendant companies were negligent and that the negligence of both contributed to produce the death of Murray.

It is further urged in the case at bar that the railroad company is not liable, because the injuries alleged to have been sustained by the plaintiff were not produced or brought about

by any negligence of the railroad company; that the petition does not affirmatively show that any act of negligence of the railroad company was the proximate cause of the plaintiff's injuries, but on the contrary, the petition affirmatively shows that the proximate cause of the plaintiff's alleged injury was the stopping of the street car upon the railroad track.

Proximate cause has given the courts a great deal of trouble. There is a very interesting and instructive article by Professor Jeremiah Smith, of Cambridge, in the December, 1911, number of the *Harvard Law Review*, Vol. 25, No. 2, in which he very learnedly and logically considers the question of "proximate cause" and "legal cause" in actions of tort. Among other things, he says that:

"John Stuart Mill, on his work on Logic, says, in substance, that the cause of an event is the sum of all the antecedents, and that we have no right to single out one antecedent and call that the cause."

Professor Smith then proceeds to say that the logician's view of cause is not the juridical view, but the practical question for a jurist is whether the tortious conduct of any human being has had such an operation in subjecting a plaintiff to damage as to make it just that the tortfeasor should be held liable to compensate the plaintiff. He says that the maxim laid down by Lord Bacon and his comments thereon, can not be considered as legally correct if taken in the literal sense.

This maxim, "*In jure non remota causa, sed proxima, spectatur*," Professor Smith says, taken literally, would be understood as implying that the antecedent which is nearest in space or time is invariably to be regarded as the legal cause. He further says:

"But it is a mistake to suppose that contiguity in space or nearness in time are legal tests of the existence of causal relation."

He quotes from Bower's Code of Actionable Defamation, p. 315, the following:



1912.]

King v. Railway.

“ ‘Remoteness’ again is an utterly misleading and illogical term. It comes from the hazy and incorrect maxim, ‘*in jure proxima causa, non remota, spectatur*,’ as elaborated by Sir Francis Bacon (Maxims of Law, Reg. 1) in his continually quoted but ridiculously unscientific comment, ‘it were infinite to consider the impulsions of causes one upon another,’ etc. It is just this which the law has to consider. It is not a question of remoteness and proximity, but of causation or non-causation. \* \* \* Proximate cause as a term to indicate the relation of legal cause and effect is a misnomer.”

Professor Smith further quotes from the case of *Marble v. Worcester*, 4 Gray (Mass.), 395, the following language of Judge Thomas in the dissenting opinion:

“The reasonable inquiry, I submit, is not which is nearest in place or time, but whether one is not the efficient, producing cause, and the others but incidental.”

He further calls attention to what is sometimes called “The But for Rule” or “But for which Rule,” and sometimes “The *Causa sine qua non* Rule”:

“This test or rule affirms that the defendant’s tort is the legal cause of the plaintiff’s damage; but for the commission of defendant’s tort, the damage would not have happened.”

Under this topic, Professor Smith says:

“A defendant’s tort must be distinctly traceable as one of the substantial efficient antecedents; as having had a substantial share in subjecting plaintiff to the damage.”

He further calls attention to another alleged test of the existence of causal relation which he says is based upon the distinction between a cause and a condition, and says:

“The distinction between cause and condition would be valuable, if there were any definite standard for determining what is a cause and what is a condition. The only standard by which this can be determined is the same as that which determines a proximate from a remote cause; \* \* \* Accordingly, ‘condition’ or ‘occasion’ while affording a convenient verbal distinction, is, in use, likely to mislead thinkers into a conviction that

they have something which they have not." Citing 1 Jaggard on Torts, 64.

He calls attention also to what Dr. Wharton, in his work on Negligence, 1st Ed., denominates as the "Last (or Nearest) Wrongdoer Rule," which is in substance as follows:

"The legal cause is the last (or nearest) culpable human actor to be found in the chain of antecedents: *i. e.*, the one acting last before, or nearest to the happening of the damage to the plaintiff."

Professor Smith says that this is a working rule to apply in a hurry. In a great majority of cases it gives the correct result. But it will not always do. He further says:

"Moreover, the last wrongdoer, if himself liable, is not necessarily the only party liable. An earlier wrongdoer may sometimes be suable at the election of plaintiff."

Professor Smith gives this illustration:

"Suppose that there are two tortious human actors, A and B, in the chain of antecedents, not acting in concert; that A's tort began earlier; that B's tort, which began later, immediately preceded the happening of the damage to the innocent plaintiff and was the only force in active motion at the time of the damage. Is B liable? Can the innocent plaintiff, in any conceivable case, have a right to sue A?"

It seems to me that giving the petition the construction most favorable to the railroad company, the answer to the supposed case just put by Professor Smith, will determine the question of the proximate cause of plaintiff's injury in the case at bar. Now, how does Professor Smith answer this case? He says:

"If B's tort has a substantial share in bringing about the damage, B, of course, can not be exonerated on the ground that his tort was, in one sense, 'caused' by the earlier tort of A."

He further says:

"But because B is liable, it does not necessarily follow that A is exonerated. By the decided weight of authority, A would be

1912.]

King v. Railway.

liable if he foresaw, or ought to have foreseen, the commission of B's tort, and the resultant damage, as a not unlikely consequence of his earlier tort."

Professor Smith cites in this connection in support of his supposed case and his answer thereto, Clerk & Lindsell on Torts, 5th Ed., 519, 522, a most excellent and exhaustive work on torts. In Clerk & Lindsell at the place above cited, it is said:

"In many cases it is not correct to speak of A and B as 'successive' wrongdoers, nor to call A 'the earlier,' or B 'the later' wrongdoer."

He also cites this language from Pollock on Torts, 8th Ed., 464:

"What has been said concerns the question of causation when arising in litigation between an innocent plaintiff and one of two independent wrongdoers. But it should be carefully noted that, in a controversy between two negligent wrongdoers, courts are inclined to adopt an exceptional rule of legal cause, differing from the ordinary rule of legal cause which is applied in a suit by an innocent third party against either of said wrongdoers. The term 'proximate cause' or 'legal cause' is not used in precisely the same sense in fixing defendant's liability to an entirely innocent plaintiff and in fixing a negligent plaintiff's disability to sue a negligent defendant."

Now in the case at bar, if we apply these principles laid down by Professor Smith, it would appear that there was negligence, first on the part of the defendant railroad company in opening its gates and thereby inviting the street car upon which the plaintiff was a passenger to come upon the railroad track at a time when it was dangerous to do so because of the approaching train from the east, which approaching train the watchman at the crossing did know of, or, in the exercise of ordinary care should have known of. The street car company's agents and employes were negligent in not going forward far enough upon the railroad tracks to observe the approaching train. The street car company's employes were again negligent in permitting the car to stop upon the railroad tracks. And the railroad company was negligent in backing down its train without having a proper headlight thereon.

Now, it seems to the court that all of these acts of negligence were concurring, and that in the chain of causation it can not be said by the court that any one or two of these negligent acts was the legal cause which resulted in the plaintiff's injury.

It appears to the court that the proper rule to apply is to submit to the jury the question of whether or not any or all of the alleged negligent acts of the defendants contributed to bring about the plaintiff's injury, and if only those negligent acts alleged against the street car company produced the injury, then the street car company should be held liable by the jury; or, if the alleged negligent acts of the street car company did not bring about the plaintiff's injury, but only the alleged negligent acts of the railroad company, then the railroad company should be held liable and not the street car company. Or, if the jury should find that it was the concurring negligent acts of both of the defendants which contributed to plaintiff's injury, then both should be held liable by the jury. Or, if the alleged negligent acts of neither failed to bring about or contribute to the plaintiff's injury, then neither of the defendants should be held liable by the jury.

I am not prepared to say that the proximate cause of this injury was the stopping of the street car upon the crossing. It is true that it may be claimed that the presence of the street car upon the track at the time and place of the plaintiff's injury was a condition and not a cause of the injury; but if this be true, nevertheless, the plaintiff was an innocent sufferer, if the averments of his petition be true, because of the alleged negligent acts of both of the defendants or either of them; nor was he responsible for the condition that was produced by the street car being upon the railroad tracks at the time and place.

It appears to the court that the petition is proof against the demurrer of the defendant railroad company both upon the question of the location of the gate and the proximate cause. This conclusion appears to be sustained by the decision of our circuit court in the case of *Kopp v. B. & O. S. W. Ry. Co.*, 6 C.C. (N.S.), 103, affirmed by the Supreme Court without report, 70 O. S., 436. Judge Giffin, in deciding the case, employs this language in commenting upon the case of *Street Railway Co. v. Murray, supra*:

1912.]

Cleveland v. Stone Co.

"It may be said of that case that notwithstanding the gates were up, and notwithstanding the employe of the street railway company failed to go ahead to see if the way was clear, still the collision would probably not have occurred had the employes of the railroad company operating the train given some signal of the approaching train, and that the failure to do so was the direct cause of the accident, and therefore the street railway company was not liable. *But the court evidently considered the three causes, although distinct and independent, as concurring to cause the collision.*"

For the reasons stated the demurrer of the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company to the plaintiff's petition will be overruled.

#### DAMAGES FOR CHANGE OF GRADE.

Common Pleas Court of Cuyahoga County.

THE CITY OF CLEVELAND V. THE CLEVELAND STONE  
COMPANY ET AL.

Decided, June 12, 1912.

*Change of Grade—Right to Damages Vests, When—And Passes to Grantor Who Has Suffered the Diminished Value—Construction of Section 3823.*

The right of an abutting owner to compensation on account of a change of grade vests not later than the time when the work of changing the grade has so far progressed as to materially obstruct and interfere with access to the property; and in the absence of an agreement to the contrary the right to receive such compensation remains in such owner, and does not pass to a grantee to whom the property was transferred subsequent to such vesting.

*Newton T. Baker*, for plaintiff.

*Squire, Sanders & Dempsey, T. C. Willard and Smith, Taft & Arter*, contra.

LAWRENCE, J.

This is an application by the city of Cleveland to assess damages by reason of the change of the grade of Clark avenue, pur-

suant to an ordinance passed by the council of said city on the 14th day of August, 1905, and, the amount of said damages being admitted and a jury being waived, the case is submitted to the court to determine who is entitled to the same.

This ordinance provided that all claims for damages caused by said improvement should be adjusted after the completion of the same.

At the time of the passage of said ordinance F. M. Stearns, who has since died, was the owner of the premises in question having a frontage of 170 feet on Clark avenue, but on the 27th day of August, 1906, he conveyed the same to the Cleveland Stone Company by warranty deed, containing no reservation of any claim for damages by reason of the change of grade or any mention of the proceedings for such purpose. At and prior to the time of such conveyance the Cleveland Stone Company was in possession of said premises as lessee from said Stearns; and it is admitted that said company, as such lessee, is entitled to damages in the sum of \$1,500 out of the total damages agreed upon; so that the controversy here has reference only to the remainder of such damages, and the question is whether the same belongs to the Cleveland Stone Company or to the estate of Mr. Stearns, or whether the amount should be divided between them.

On the 3d day of March, 1906, Mr. Stearns, the then owner, filed with the city clerk a claim for damages by reason of the change of grade in said street, and on the 10th day of March, 1906, the Cleveland Stone Company filed with the city clerk its claim for damages as such lessee.

On May 28th, 1906, the city of Cleveland, through the contractor for said improvement, commenced the work of changing the grade of Clark avenue. The total quantity of excavation required to be done in the making of said improvement amounted to 33,200 cubic yards, of which 12,676 yards had been done prior to August 27, 1906, when the deed by Stearns to the Cleveland Stone Company was executed and delivered. Subsequently the entire work continued to be done and was completed.

I am not able to state the exact amount of excavation which had been done immediately in front of these premises prior to

1912.]

Cleveland v. Stone Co.

August 27, 1906. The city, however, through the contractor, had taken possession of the entire portion of the street to be improved, and had commenced the work of grading in front of said premises. It is stated in the answer of the Cleveland Stone Company that on said date the excavation at the west end of said premises was three or four feet in depth, gradually sloping up towards the east end of said premises, and I assume this to be correct.

It is contended on behalf of the stone company that it is entitled to all of the damages in dispute, by virtue of Section 54 of the Municipal Code (now Section 3823 of the General Code), which provides as follows:

“An owner of a lot, or of land, bounding or abutting upon a proposed improvement, claiming that he may sustain damages by reason of the improvement, within two weeks after the service of the notice or the completion of the publication thereof, shall file a claim in writing with the clerk of the council, setting forth the amount of damages claimed, and with a general description of the property with respect to which it is claimed the injury will accrue. The owner who fails to do so shall be deemed to have waived such damages and shall be barred from filing a claim or receiving damages. This provision shall apply to all damages which will obviously result from the improvement, but shall not deprive the owner of his right to recover damages arising, without his fault, from the acts of the corporation, or its agents. If, subsequent to the filing of such claim, the owner sells the property, or any part thereof, the assignee shall have the same right to damages which the owner would have had without the transfer.”

This section, however, does not create any right to damages, but its purpose is to limit the enforcement of such right to those who file their claims for damages within the time specified. All who do not do so are deemed to have waived damages. Under the decisions of the courts in this state the right to damages for change of grade exists independently of any statutory provisions; and indeed the earlier decisions, which established what is known as the Ohio doctrine on this subject, were made before there were any statutes relative to such damages. There being



now no statute respecting damages for the change of grade of county roads, the Supreme Court, in *Smith v. Commissioners*, 50 O. S., 628, held that an action at law could be maintained against the board of county commissioners to recover such damages, basing the holding upon the general doctrine declared in *Crawford v. Delaware*, 7 O. S., 471.

In my opinion, the provision at the end of said section, to the effect "that, if subsequent to the filing of such claim, the owner sells the property, or any part thereof, the assignee shall have the same right to damages which the owner would have had without the transfer," operates to protect the assignee from being barred of any claim which he may have acquired from the conveyance of the property to him, and if his grantor has filed a claim for damages, this inures to his benefit in case he is entitled to damages; but the statute does not, and in my opinion could not, take from the previous owner any right to damages which had become vested in him previous to the conveyance.

The question then is, when does the right to damages from a change of grade become vested? In the case of property actually taken or appropriated for public use, under the power of eminent domain, there is no room for controversy, as the damages in such case belong to the owner of the property at the time the appropriator entered into possession thereof, or at the time judgment is rendered in an appropriation proceedings, provided possession is taken within the time limited by law in such case.

In *Wadhams v. Railroad*, 42 Pa. St., 303, at 310, the court say:

"It is one injury, and when the railroad has been located, the land has been taken and appropriated for public use, the right of the land owner to sue for his damages is complete, and he may recover all which may be caused by the location and by the location and the subsequent construction. He can have but one action. The damages can not be severed."

The case of property damaged by a public improvement is not precisely the same as the case of property taken for public use, but it seems to me that essentially the same rule would apply respecting the vesting of the right to compensation, as far as it can be worked out in a particular case.



1912.]

Cleveland v. Stone Co.

I have found no decisions in Ohio which are directly in point on the question here involved as to the case of a change of grade, but there are a number of cases arising under the statutes or constitutions of other states which may be considered, provided we bear in mind the statutory or constitutional provision under which the case arose.

Where a limitation is prescribed dating from the time the change is "effected" or completed, it has been held generally that the limitation begins to run when the work is fully completed.

The majority of the cases hold that the mere passage of an ordinance providing for a change in the grade of a street is not of itself sufficient to give rise to an immediate cause of action.

The constitution of Pennsylvania requires compensation to be made for property taken, injured or destroyed for public use.

In *Cass v. Pennsylvania Company*, 159 Pa. St., 273, it was held that the right of action of a property owner on the street is complete not later than the time when the work (of changing grade) has progressed to such an extent as to obstruct ingress and egress to and from the property to the street.

In *Hawley v. Pittsburg*, 204 Pa. St., 428, the court say:

"The rule established by our decisions is, that it is the physical change, and not the mere establishment of a grade on the official plans, that gives a right of action, and that no damages are recoverable for a change of grade until the actual work on the ground is begun."

The same holding is made in *Devlin v. Philadelphia*, 206 Pa. St., 518.

There are many authorities to the effect that a change of grade is presumably permanent in character, and that a lot owner whose property is injured thereby can not split his cause of action, but must recover all damages, past and prospective, in one action.

Section 785 of the Iowa code is as follows:

"When any city or town shall have established the grade of any street or alley, and any person shall have made improve-

ments on the same or lots abutting thereon, according to the established grade thereof, and such grade shall thereafter be altered in such manner as to damage, injure or diminish the value of such property so improved, said city or town shall pay to the owner of such property the amount of such damage or injury."

In *Hempstead v. Moines*, 63 Iowa, 36, it was held that the cause of action arose upon the actual change of the grade, and, it appearing that the city had actually changed the grade from curb to curb, but had not cut down the sidewalk, it was further held that the right of action for cutting down the street and sidewalk was one and indivisible; and that the property owner, having in a former action recovered of the city for cutting down the street from curb to curb, could not maintain another action for damages for cutting down the sidewalk, as these damages were incidental to and essentially connected with the subject-matter of the prior suit and must be held to have been adjudicated therein.

In *Foley v. Cedar Rapids*, 133 Iowa, 64, the court say that surely the plaintiff can not recover damages for each load of dirt hauled in front of his premises, nor for each brick laid in the pavement; and the action being indivisible, it was held that an action for damages caused by a change in the grade of a street is in time if commenced within three months from the date of completion or abandonment of the work—the statute requiring the action to be brought within three months after the cause of action accrued. See also *Lafayette v. Nagle*, 113 Ind., 425; 1 *Elliott on Roads & Streets* (3d Ed.), Sec. 585.

Under the Ohio statute giving to the city the option of having the damages for a change of grade assessed after the completion of the improvement, a property owner can not maintain an action at law for the recovery of such damages, at least until after the city has unreasonably neglected to file an application for the assessment of damages. This, however, does not show that no right of damages existed, for the right is entirely distinct from the mode and time prescribed for the enforcement of such right.

The cases I have cited relative to changed grade are not altogether consistent, nor are they necessarily controlling here; but

1912.]

Brewing Co. v. Taft.

it seems to me that the principle, uniformly recognized, that the damages to be recovered are indivisible, leads to but one conclusion. The person who owned the property at the time the work of changing the grade was commenced and while it was being carried on to such an extent as to materially obstruct and interfere with the access to his property, the work being of a permanent character, certainly sustained substantial injury affecting the value of his property. The right to compensation for such injury was personal to him, and did not pass by the subsequent conveyance of the property. On the other hand, the purchaser while the work was in progress may well be deemed to have purchased in view of the circumstances then existing, and to have obtained the property at a price diminished to the extent of the damages which would be caused by the change of grade when completed. In this view the former owner would also lose all of that diminished value. To deprive him of any part of the damages he had sustained would be to deprive him of property without due process of law, which can not be done.

In my opinion, the estate of Mr. Stearns is entitled to the entire amount of the damages to be awarded, less such portion thereof as belongs to the Cleveland Stone Company as lessee, and this seems to me to be in harmony with the rule which prevails in cases where there has been an actual taking of property for public uses.

---

#### DAMAGES FOR SHORTAGE IN LAND CONVEYED.

Common Pleas Court of Hamilton County.

THE JOHN HAUCK BREWING COMPANY V. WILLIAM HULBERT  
TAFT ET AL.

Decided, August 14, 1912.

*Pleading—In Action for Damages for Shortage in Land Conveyed Under Deed of General Warranty.*

In an action for damages for shortage in land conveyed under a deed of general warranty by metes and bounds, the mere statement of the breach is not enough, but the fact or facts which show the breach must be alleged.

*Oscar Stoehr*, for plaintiff.

*Geo. P. Stimson*, contra.

DICKSON, J.

The plaintiff states that some real estate was purchased by it in Cincinnati, Ohio, and describes the same by metes and bounds; that a deed of general warranty was delivered to it. The plaintiff complains that upon entering said real estate, it was found that there was not as much property there as was purchased, and as much as was warranted, and prays damages by reason of a breach in its warranty rights.

The defendant demurs because facts are not stated sufficient to sustain any cause of action; and claims in argument, that there can be no relief for plaintiff by way of the warranty until an eviction, or some state of facts equal thereto have occurred.

As against this the plaintiff in argument contends that since the doing away with livery of seisin by the actual giving and taking of a token, or on actual view, it has a right to rely upon the description in the deed, and that when upon view or entry a shortage be discovered, such is equal to an eviction and damages lie.

While the court is disposed to agree with the plaintiff, yet so far as the facts stated are concerned the demurer must be sustained, because no fact is stated as to why the plaintiff has not seen or can not enter upon all it bought.

If some fact equal to an eviction occur and be relied upon, certainly such must be stated. The mere statement of a breach is not enough. The fact which shows the breach must be stated, *i. e.*, the plaintiff must state why it can not enter on to what it bought; neither is the bald statement that the plaintiff owned property other and different than that described in the deed certain enough.

The demurrer will be sustained.

1912.]

Westfall v. Railway.

**TO ENJOIN ULTRA VIRES ACQUISITION OF CORPORATE STOCK.**

Common Pleas Court of Franklin County.

**RALPH E. WESTFALL V. LAKE SHORE & MICHIGAN SOUTHERN  
RAILWAY COMPANY ET AL.**

Decided. October 14, 1910.

*Corporations—Situs of Action to Enjoin Railway Merger—Property  
Rights of Stockholder—Jurisdiction—Corporations—Process.*

1. An action by a stockholder in a railway company to enjoin the acquisition by the company of stock in another railway on the ground that such acquisition would be *ultra vires*, is an action for protection of the property rights of the stockholder, and the company whose stock it is proposed to acquire is not a necessary or proper party.
2. Such an action must be brought in a county having jurisdiction over the company in which the plaintiff is a stockholder.

*Bennett & Westfall, C. Huling and W. H. Jones, for plaintiff.  
Doyle & Lewis, contra.*

**KINKEAD, J.**

This case is submitted upon motions made by the defendants, the Lake Shore & Michigan Southern Railway Company, and the Kanawha & Michigan Railway Company, to quash the service of summons upon them for the reason that the court in this case has no jurisdiction over them.

It is also submitted upon a demurrer to the petition by the defendant, the Toledo & Ohio Central Railway Company, so far as its liability is concerned.

It is urged in support of the motions that the cause of action asserted by the plaintiff is one brought for the protection of his property right as a stockholder of the Lake Shore & Michigan Southern Railway Company; that he has no cause of action on account of the complaints made by him against the Toledo &

Ohio Central Railway Company, which is the only railroad through whose lines its railway runs.

On the other hand, it is contended by counsel for the plaintiff that this is a proceeding in equity, and that the Toledo & Ohio Central Railway Company, whose stock is alleged to be owned by the Lake Shore, is an indispensable party; and for that reason the action was rightly brought in Franklin county and the summons was properly issued and served upon the Lake Shore in Cuyahoga county.

The determination of the question depends entirely upon the gist of the cause of action asserted by the plaintiff. He brings the action in his own name as a stockholder against the Lake Shore Company. He avers, in substance, that the Lake Shore Company entered into a conspiracy with the Chesapeake & Ohio to avoid a decree rendered by the Circuit Court of Franklin County, adjudging that the Hocking Valley Railway Company be ousted from the power of owning and holding shares of stock in the Kanawha & Michigan Railway Company; that in furtherance of such scheme the Chesapeake & Ohio Railway Company acquired a majority of the outstanding common stock of the Hocking Valley, and the Hocking Valley transferred to the Lake Shore road all the capital stock of the Toledo & Ohio Central previously owned by the Hocking Valley, and that the Hocking Valley transferred to the Lake Shore and to the Chesapeake & Ohio all the capital stock of the defendant, the Kanawha & Michigan Railway Company. It is further averred that the Lake Shore Company placed its own managerial officers in charge of the Toledo & Ohio Central and is now in actual control thereof. It is averred that by reason of this arrangement between the railway companies concerning the stock and the transfers that have been made as herein set out, that there has been effected a virtual consolidation of the Hocking Valley Company and the defendants, the Toledo & Ohio Central Railway Company, the Lake Shore, and the Chesapeake & Ohio, and that all competition between such railroads within the state of Ohio is eliminated and destroyed; that such acquisition by the defendant, the Lake

1912.]

Westfall v. Railway.

Shore, of the outstanding capital stock of the Toledo & Ohio Central, and its acquisition in connection with the Chesapeake & Ohio, of the stock of the Kanawha & Michigan Railway Company, is contrary to the laws and settled policy of the state of Ohio. That the Lake Shore Company had no right, power or authority to acquire the outstanding capital stock of the Toledo & Ohio Central or any interest in the stock of the Kanawha & Michigan Railway Company; that the Lake Shore Company does not connect with the Kanawha & Michigan; that the acquisition of such stock as herein alleged is *ultra vires*.

The prayer in the petition is that the Lake Shore road be restrained from acquiring any further interest in the capital stock of the defendant railways or either of them, and from voting any of the stock so acquired, and that they be enjoined from participating in any meeting of the stockholders of the respective companies, and for general relief.

The conclusion is irresistible that the gist of the complaint of the plaintiff is an alleged injury to his property rights as a stockholder by reason of the unlawful acts of the Lake Shore Company in acquiring the capital stock of the Toledo & Ohio Central Railway and the Kanawha & Michigan Railway. It would seem to make no difference as to what the purpose or object of the acquisition of such stock was, whether it was to control the Toledo & Ohio Central and Kanawha & Michigan roads for its own benefit alone, or whether it was to effect a virtual consolidation of the roads which were formerly involved in the Hocking Valley *quo warranto* suit. Having given the question of the cause of action in a case like this very earnest and careful consideration, in *Manington v. Railway*, 9 N. P., 641, and having reached the conclusion there that the action was brought by the stockholders for the express purpose of relying upon a property right, I can come to no other conclusion in this case than that the whole basis and ground of action asserted by the plaintiff is to restrain the Lake Shore Company from engaging in illegal acts by expending its funds in the purchase of stocks in other railways contrary to law or in entering into alleged

schemes and conspiracies with other railways to accomplish illegal or unlawful objects for the purpose of preventing a diversion of the funds of the railway company thereby resulting in an injury to his rights as a stockholder. The fact that this is an equity case, and that interests of other persons connected with the other railways, and of other railway corporations may be indirectly involved, has no material bearing so far as the cause of action is concerned. The rule is well settled in *Allen v. Miller*, 11 Ohio St., 374, and *Drea v. Carrington*, 32 Ohio St., 595, that the person or party who is served in the county where the action is brought must have a substantial interest in the controversy; and in an equity case the defendant in the jurisdiction where the action is brought must be a necessary and indispensable party.

I do not regard the Toledo & Ohio Central Railway Company as having any interest whatever in the cause of action asserted by the plaintiff, nor is it a necessary and indispensable party. The only relief invoked, or that can be granted in this action against the one party sought to be held on the cause of action asserted, is to restrain it from doing the illegal and unlawful acts alleged in the complaint. While in the order that may be made in the case, providing the action is brought in a proper jurisdiction, might affect, in some way, the other railway companies, that would be no concern of the court in dealing with the question of the powers of the Lake Shore road in investing its funds and in protecting the rights of a stockholder. The case of *Minnesota v. Northern Securities Co.*, 184 U. S., 199, cited by counsel for the plaintiff, and so strongly urged upon the court, is clearly distinguishable from the cause of action here asserted, and not at all applicable. That case was a bill in equity against the Northern Securities Company, which was a corporation organized under the laws of New Jersey, and was a citizen of that state. It was organized for the purpose of holding the stocks of the Great Northern and Northern Pacific Railway companies, which latter railways were subject to the jurisdiction of the courts of the state of Minnesota. The action was brought in the



1912.]

Westfall v. Railway.

name of the state and sought to prevent, by injunction, a corporation organized under the laws of another state, with power to acquire and hold shares of the capital stock of any other corporation, from obtaining and exercising ownership and control of two or more competing railroad companies so as to evade and defeat the laws and policies, adopted by the state of Minnesota, forbidding the consolidation of such railroads when parallel and competing. It was said by the court in that case that if the proper parties were before the court, that it would have jurisdiction over the matters complained of in that case. The Northern Securities Company, being a holding company and having the stocks of the other companies in its possession, the subsidiary companies were naturally interested in an action so comprehensive in its nature as that asserted by the state of Minnesota and which was brought for the purpose of preventing an evasion of the laws of that state. If the action had been maintained successfully, it would have accomplished precisely the same purposes that might have been accomplished by a proceeding in *quo warranto*.

The case can have no bearing whatever upon the question involved here. The plaintiff in this case may make claims such as are made here, that the defendant, the Lake Shore, is committing acts of an *ultra vires* character, entering into schemes and conspiracies to evade the laws and general policy of the state, but such claims are made and can be made only for the express purpose of reflecting upon the property rights asserted by the plaintiff. The case of *Pearsall v. Railway*, 161 U. S., 646, is more nearly in point with the questions before us. Pearsall, a stockholder in the Great Northern Railway, brought a suit against the company, on his own behalf and all stockholders similarly situated, to enjoin it from entering into and carrying out a certain agreement between that company and the holders of bonds secured by the second and third general mortgages, and the consolidated mortgage of the Northern Pacific Railroad Company, under which, upon a sale and foreclosure of the mortgages given to secure such bonds, the holders were to purchase or cause

to be purchased the property and franchises of the Northern Pacific Railroad Company. In that case the Northern Pacific Railroad Company was not made a party, and the relief prayed for was granted by the judgment of the Supreme Court without the presence of the Northern Pacific. The judgment so rendered would affect that road in no different manner than would the judgment rendered in this case if the court had jurisdiction.

For the reasons stated, the conclusion reached is that the motions made by the Lake Shore & Michigan Southern Railway Company, and the Kanawha & Michigan Railway Company to quash the summons upon them for want of jurisdiction are well taken, and the same are sustained.

The same reasons make it plain that the petition presents no cause of action against the Toledo & Ohio Central Railway Company, and the demurrer interposed by it is sustained, and the action is dismissed.

---

### **ACTION FOR TORT OF A PUBLIC OFFICER OF ANOTHER STATE.**

Common Pleas Court of Hamilton County.

CHARLES B. WILSON, BERNARD PLOEGER AND JOHN ADER v.  
AUGUST HELMBOLD.

Decided, March, 1912.

*Jurisdiction—Refused by an Ohio Court—Where the Action Was for  
Malicious Imprisonment by Officers of Another State.*

An Ohio court of common pleas will not take jurisdiction of an action in tort, brought by a resident of the state of Kentucky against a public officer of that state, where the only reason for the Ohio court assuming jurisdiction is that the defendant was found in this state, and the similar policy prevailing in both states indicates that justice could be better administered in a suit of like character now pending between the same parties in the state of their residence and the county where the cause of action arose.

1912.]

Wilson v. Helmbold.

*Charles M. Leslie*, for plaintiffs.*Healy, Ferris & McAvoy* and *Horace W. Root*, contra.

HUNT, J.

All three of the above causes are to be determined by the decision in the first case, in which a demurrer to the third, fourth and fifth defenses of the third amended answer has been filed.

The plaintiff according to his petition, on July 10, 1905, was in the discharge of his duty as a night jail guard in the jail at Newport, Campbell county, Kentucky. On that date the defendant with others, it is alleged, maliciously assaulted plaintiff and maliciously imprisoned him in another place, to his damage in the sum of \$10,000.

Defendant by his third defense says that he and the plaintiff are and have been, continually, residents of Newport, Kentucky. On July 10, 1905, he was the duly elected, qualified and acting mayor of the said city, vested with the care and superintendence of said jail; that by virtue of Section 3202 of the statutes of Kentucky, he was at that time the conservator of the peace, and under Section 26 of the criminal code of Kentucky, was vested with the power of a magistrate; that Section 74 of the civil code of Kentucky provides that an action upon the cause of action set forth in the petition must be brought in the county where the injury was done, or where defendant resides.

By way of a fourth defense the defendant alleges the facts as to the residence of plaintiff and defendant, that the defendant was, at the time, mayor of Newport and that all the acts done or alleged to be done, were done or ordered to be done by defendant as mayor of said city, and by virtue and under color of his office; and further, that Section 63 of the civil code of Kentucky provides that every action against a public officer for any act done under color of office must be brought in the county where the cause of action arose.

By way of a fifth defense, it is further alleged that there is an action pending between plaintiff and defendant upon the same cause of action set forth herein, brought by plaintiff prior to the

bringing of this action, in the Circuit Court of Campbell County, Kentucky.

To the third, fourth and fifth defenses plaintiff demurs generally.

It may be conceded that an action for tort is not local but transitory, and, as a general rule, can be maintained where the wrongdoer can be found, but it must also be conceded that the question of remedy, including the question as to whether the court can or must assume jurisdiction, depends on the *lex fori*.

The court of common pleas in Ohio by Article IV, Sections 4 and 18 of the Constitution of Ohio, has such jurisdiction as "shall be fixed by law." *Stevens v. State*, 3 Ohio St., 453.

Section 11215, General Code (R. S., 456), provides that:

"The court of common pleas shall have original jurisdiction in all civil cases \* \* \* subject to the regulation provided by law."

Section 13425, General Code, provides for jurisdiction in criminal cases.

Section 11271, General Code (R. S., 5022) provides that:

"Actions for the following causes must be brought in the county where the cause of action or part thereof arose. \* \* \* Against a public officer for an act done by him by virtue of or under color of his office or for neglect of duty."

Section 11276, General Code (R. S., 5027), provides:

"An action other than one mentioned in Section 11268 \* \* \* 11271, may be brought in any county \* \* \* where such defendant is found \* \* \*."

Although the jurisdiction of the court of common pleas in Ohio by statutory provision is practically general, yet if by statute such court is not given jurisdiction expressly or by necessary implication, it has no jurisdiction; and an error in legislative judgment in abolishing or failing to provide a particular remedy, can not be judicially corrected. *Hough v. Manufacturing Co.*, 66 Ohio St., 427, 435.

1912.]

Wilson v. Helmbold.

If, therefore, the statutes fail to give the court of common pleas jurisdiction, or so limit the general jurisdiction conferred, that the plaintiff can not proceed with his action in the court of common pleas of this county, the court can not proceed.

Unless, therefore, the term "public officer" is to be limited to public officer of the state of Ohio by reason of Section 11271, Clause 2, General Code, the fourth and fifth defenses alleging that what was done was by virtue and under color of office, etc., in Campbell county, Kentucky, regardless of the residence of either plaintiff or defendant or both, would preclude the court of common pleas from proceeding, inasmuch as the cause of action or a part thereof did not arise in this county.

It may be said that such construction would preclude a resident of Ohio from commencing a suit in Ohio against either a resident or non-resident of Ohio for a tortious act done by the defendant in another state, by virtue of or under color of an office held in such state at the time of the commission of the act. That may be so, and such fact would not give the court of common pleas in Ohio jurisdiction where clearly not given or excluded by clear statutory provision.

The case of *Atkins v. Borstler*, 46 Mich., 552, is inapplicable inasmuch as in Michigan, the Constitution, Article VI, Section 8, conferred such jurisdiction on the court and the court was under the necessity of construing a statute apparently limiting such jurisdiction, so as to be constitutional if possible.

It may be argued that the term "public officer" in Section 11271, General Code, is necessarily applicable to officers of sister states by reason of Article IV, Section 1 of the Constitution of the United States, requiring that, "Full faith and credit shall be given in each state to public acts, records, and judicial proceedings of every other state," and that when an act of such officer is in question as official or under color of office, regardless of any rule applicable to the act of an officer of a strictly foreign country, it must be given the force and effect prescribed by the law of the state creating such office, thereby necessarily recognizing his character as a public officer.

The use of the word "county" in Section 11271, General Code, apparently assumes that the acts, as to which the general jurisdiction given by Sections 11215 and 11276, General Code, to the court of common pleas, is limited, were committed in some county, and that it is not to be presumed that the Legislature of Ohio in the use of such word is recognizing any of the subdivisions of sister states, sometimes called by other names than counties, and therefore that the limitation of the general jurisdiction of the court of common pleas is applicable only where the act is committed in one of the counties in Ohio.

Without such limitation the court of common pleas, under Section 11215 and 11276, General Code, the defendant having been found and served in Hamilton county, has jurisdiction regardless of the residence of the plaintiff or defendant or both, or the place where the tort was committed.

In view, however, of these statutory provisions, the question as to whether the court has or has not jurisdiction is sufficiently doubtful to preclude the court from being compelled by mandamus to proceed until the question of jurisdiction has been finally determined in the action itself.

Notwithstanding, however, such jurisdiction, under the circumstances of the case as admitted by the demurrer to the third amended answer, is the court required to exercise it? .

Both plaintiffs and defendant are and were residents of Campbell county, Kentucky, where the alleged malicious assault and false imprisonment were committed. It was by virtue of and under color of an office in such county then held by the defendant. The law to be construed in determining the scope of defendant's official acts are Kentucky laws, and presumptively, the witnesses are of the same locality. It does not appear that the defendant has any property in this state, nor that he has none in Kentucky. The policy of Kentucky like that in Ohio, as disclosed by the laws pleaded, is to require such action to be brought in the county where the cause of action arose. The plaintiff has an action now pending in such county against the defendant upon such cause of action. It must be presumed that

1912.]

Wilson v. Helmbold.

the courts of Kentucky under such circumstances will administer justice. Are the courts of Ohio without cause other than that the defendant by personal service has been brought into court, to encourage the transfer to Ohio from sister states of the controversies of residents of such sister state?

The question is not a new one in other jurisdictions.

Wharton, Conflict Laws, Sections 705, 707, says:

“In Germany, England, and the United States (the latter with the partial exception of Louisiana), the courts as a general thing, make no distinction, so far as jurisdiction is concerned, between cases in which the parties are foreigners, and those in which they are subjects. \* \* \*

“Otherwise in France. On the other hand, the principle asserted by the English and American courts \* \* \* has been pushed too far \* \* \* particularly in connection with divorce. \* \* \*

“Lately, while acknowledging the principle, there has been a growing tendency to narrow its application.”

In the case of *Mostyn v. Fabrigas*, 1 Cowp. Cas., 161, 176, Lord Mansfield in 1774, in an extensive opinion, sustained the taking of jurisdiction by the English court of a suit by a native of the Colonial islands against the governor of such islands for false imprisonment.

In *Gardner v. Thomas*, 14 John (N. Y.), 134, the court refused to take jurisdiction of an action brought in New York by a British sailor against a British master for an assault committed on a British vessel on the high seas, holding, however, that the jurisdiction of the court was within the discretion of the court to be determined according to the circumstances of the case.

*Johnson v. Dalton*, 1 Cow. (N. Y.), 543, recognizes the same principle, but jurisdiction was entertained because the sailor had been practically discharged in the port of suit.

*Flower v. Allen*, 5 Cow. (N. Y.), 654, 666, 669, holds generally that Vermont officers are not liable in New York for neglect of official duty in Vermont.

*Dewitt v. Buchanan*, 54 Barb. (N. Y.), 31, in an action by one resident of Canada against another resident for assault com-

mitted in Canada, held that the court could entertain jurisdiction, but would do so only in exceptional cases.

*Maloney v. Dows*, 8 Abb. Pr. (N. Y.), 316 (discredited somewhat in *Dewitt v. Buchanan*, *supra*, by reason of Article IV, Section 22, United States Constitution). It was held that the court would not take jurisdiction of an action by one citizen of California against another citizen of the same state, acting as a member of a vigilance committee, for assault and false imprisonment committed in California, although plaintiff had been compelled to leave California by such committee.

In *Burdick v. Freeman*, 120 N. Y., 420, 426, it was held that:

“The courts of this state may, in their discretion, entertain jurisdiction of any action for the recovery of damages for a personal injury between citizens of another state, actually domiciled therein when the action was commenced, although the injury was committed in the state of their residence and domicile.”

The taking of jurisdiction by the lower court was upheld because the question was not raised until after the verdict.

The same principle of discretion in entertainment of jurisdiction depending upon the circumstances of the case, was affirmed in 1910 in *Pietraroia v. Railway*, 197 N. Y., 434. Plaintiff's intestate, a resident of New Jersey, was killed in New Jersey by the negligence of a New Jersey corporation. The plaintiff, a resident of New York, was appointed in New York as administrator of the decedent. In that case the nisi prius court had entertained jurisdiction. The appellate division, *Pietraroia v. Railway & Ferry Co.*, 131 App. Div., 829, 833, reviewed the facts on which the nisi prius court had exercised its discretion in so doing, and finding that the plaintiff's appointment in New York as administrator was fraudulent, reversed the judgment and dismissed the action. This was affirmed by the court of appeals, *Pietraroia v. Railway*, *supra*, citing with approval *Burdick v. Freeman*, *Dewitt v. Buchanan*, and *Gardner v. Thomas*, *supra*, and other cases. It is true that the question as to whether the cause of action survive in favor of the plaintiff, depended pri-



1912.]

Wilson v. Helmbold.

marily upon the laws of New Jersey, but the court decided the case upon the principle of discretionary exercise of jurisdiction.

Counsel for plaintiff cited Article IV, Section 2, of the Constitution of the United States in support of the taking by this court of jurisdiction in this case, but cited no authority or reason for its application.

Southerland Constitution, 572, with reference to this constitutional provision, says:

“The privileges and immunities here referred to are those which are fundamental; protection by the government and the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject to governmental restraints exercised for the general good.”

Such constitutional provision is referred to in the case of *Dewitt v. Buchanan*, *supra*, as having some bearing on the question, but in *Robinson v. Navigation Co.*, 112 N. Y., 315, 323, it was subsequently held that a distinction between residents and non-residents in the matter of a remedy for tort committed without the state is not in contravention of this constitutional provision.

In none of the other cases in which the question, now to be determined, was an issue, has such provision been cited as having any application.

It follows, therefore, under the circumstances of this case, there being no reason why this court should entertain jurisdiction except that the defendant was found here, and every reason including the similar policy of both states, why justice could be better administered between the parties in the action now pending between them in the county of the state of their residence where the cause of action arose, that this court in the exercise of sound discretion should refuse to entertain jurisdiction of this action.

**REFUNDERS FOR DOW TAXES.**

Common Pleas Court of Licking County.

CHARLES A. STOLTZ ET AL V. C. L. V. HOLTZ, TREASURER  
OF LICKING COUNTY.

Decided, April Term, 1911.

*Taxation—Procedure where Liquor Dealer Retires from Business—And Asks for a Refunder for Dow Tax Paid—No Notice Required of Entering of his Name on the Duplicate—Pleading—Section 6074.*

In an action against a county treasurer for recovery of a balance claimed to be due to one who has retired from the business of trafficking in intoxicating liquors before the expiration of the year for which he had paid the Dow tax, an allegation of the mere filing of an affidavit with the county auditor, setting forth that on a certain day the affiant did cease to do business and retired therefrom, does not meet the requirement of the statute that the auditor must be "satisfied" that the business has in fact been abandoned before he issues a refunding order.

*Jones & Jones*, for plaintiffs.

*Phil. B. Smythe*, Prosecuting Attorney, and *Norpell, Norpel & Martin*, contra.

SEWARD, J. (orally).

This case is submitted to the court upon a demurrer to the petition. The petition alleges that the plaintiffs are residents of Licking county, Ohio, and were at the time of the bringing of this suit; that under Section 6071 of the General Code, it is provided that all dealers in intoxicating liquors shall pay a tax of one thousand dollars; that under Section 6085, it is the duty of the dairy and food commissioner to investigate and determine whether persons were violating the laws of Ohio in relation to the sale of intoxicating liquors, and if it is determined that they are, to certify that fact to the state auditor, whose duty it is to make known the facts to the auditor of the county, whose duty it is to place them on the tax duplicate and put an

1912.]

Stoltz v. Holtz, Treasurer.

assessment against them in the sum of one thousand dollars; that the dairy and food commissioner did make this investigation, and ascertained and determined that the plaintiffs in this case were engaged in the sale of intoxicating liquors in this county, and certified that fact to the state auditor and the auditor of the state notified the auditor of the county, and the auditor of the county placed them on the tax duplicate and ordered the treasurer to proceed to collect. It is further alleged that the treasurer proceeded to collect the amount assessed against the plaintiffs in this case; that plaintiff declined to pay, and the treasurer distrained and put him out of his place of business and locked it up; that plaintiff was compelled to, and did in order to release his property, pay to the treasurer the sum of \$1,190.11; that on July 10th thereafter plaintiff ceased doing business; that he made that fact known to the treasurer and auditor of the county, by filing an affidavit with the auditor of the county, and demanded a return of a portion of the amount so paid—three hundred and eighty-five dollars and some cents; that the auditor refused to issue to him an order for the payment of that sum.

Plaintiff also claims that these proceedings were without his knowledge or having any chance to be heard in the matter, and in violation of the Constitution of the United States and the Constitution of Ohio; that a federal question is raised in the matter. He seeks to recover the sum of three hundred and eighty-five dollars and some cents.

It has been held by the Supreme Court, in cases analogous to this case, that no notice is necessary to be given to the defendant or to the plaintiff in this kind of a case—a person engaged in the sale of intoxicating liquors; and the only question that the court is going to pass upon in this case is the question as to whether he was entitled to demand at the hands of the auditor a certificate for the return of a portion of the money. The allegation of the petition is:

“This plaintiff further says that on said day last mentioned he filed with the auditor of said county an affidavit showing that

on the 10th day of July, 1910, he ceased doing business in intoxicating or other malt liquors and demanded from said auditor an order on the said defendant, Holtz, to repay to him the amount of said tax not earned up to said 10th day of July, 1910, which said demand the said auditor refused to accede to."

Now, was the filing of the affidavit with the auditor sufficient to entitle him to demand a return of the amount that he claims? The court thinks not, under the section of the statute governing in that case. The auditor might not have believed what was in the affidavit.

The section which governs is Section 6074:

"When a person, company, corporation or co-partnership, engaged in such business, has been assessed and has paid the full amount of such assessment and afterward discontinues such business, the county auditor, upon being satisfied thereof, shall issue to such person, corporation or co-partnership a refunding order," etc.

There is no allegation that the auditor was satisfied that he had ceased doing business. It is not the filing of the affidavit that satisfies the auditor. He is not required to be satisfied upon the mere filing of an affidavit, but he must be satisfied that the plaintiff had ceased doing business at the time alleged in the petition.

The court thinks this demurrer is well taken, and it may be sustained.

1912.]

Lookwood v. Whittlesey.

**QUALIFICATIONS FOR BRINGING AN ACTION TO  
QUIET TITLE.**

Common Pleas Court of Cuyahoga County.

AUGUSTA C. LOCKWOOD ET AL V. GRANT T. WHITTLESEY ET AL.

Decided, September, 1912.

*Action Quia Timet—Can Not be Invoked to Create Title—But are Maintainable Only by Those Having Title—Inherited Title Not Divested by Indebtedness to Decedent—Proper Procedure with Reference to the Debtor Heir—Rights of Other Creditors of Said Heir and of Co-tenants.*

Inasmuch as a debtor heir must account to the estate of the decedent for the amount of his indebtedness, and his interest in the estate is liable for all his indebtedness without precedence to the claim of the estate, it follows that his co-tenants can not maintain an action against him and creditors other than the estate to quiet their title in the lands of the decedent.

*Carpenter, Young & Stocker*, for plaintiff.

*Wing, Myler & Turney* and *C. L. Stocker*, contra.

FORAN, J.

The petition filed in this case is a petition *quia timet* or to quiet title. It was tried upon an agreed statement of facts which, so far as is essential to the determination of the real question involved, discloses that one Harriet T. Hanford, a widow, resident of Cuyahoga county, Ohio, died intestate, May 19th, 1910, seized in fee simple of the real estate described in the petition. She left as her sole heirs at law, the plaintiff, Augusta C. Lockwood, a sister, the plaintiffs, Augusta L. Whittlesey and Charles H. Whittlesey, and the defendant, Grant T. Whittlesey, children of a deceased sister. At the time of the death of the decedent, Harriet T. Hanford, the defendant, Grant T. Whittlesey, was indebted to her for moneys loaned to him by the decedent in a sum largely in excess of his interests in her estate. The decedent left no other real estate except that described in the petition. She left more than sufficient personal property to pay

all debts due against her estate. The defendant, Grant T. Whittlesey is wholly insolvent and a non-resident of Ohio; he has paid no part of his indebtedness to the decedent's estate and the same is uncollectable. An administrator was duly appointed and qualified but no action has been taken by him or by the plaintiffs in any court, or by any legal process to subject the estate or interest of Grant T. Whittlesey in this real estate to the payment of his indebtedness to the estate of the decedent. Shortly after the death of the decedent, the plaintiffs took possession of said real estate, collected rents accruing therefrom and are still in possession thereof. The original petition was filed on November 15, 1911. A demurrer filed to this petition was sustained, and the amended and supplemental petition, upon which the case is at issue, was filed May 16th, 1912. After the filing of the original petition, November, 1911, the defendant, August M. Weber, and the Commercial National Bank, obtained judgment in this court against the said Grant T. Whittlesey in an amount largely in excess of his interest in the decedent's real estate. On behalf of one of the defendants, the Commercial National Bank, a levy was made upon the premises described in the petition, an order of sale issued and the land is being now advertised for sale to satisfy said judgments or the judgment liens against his said interest. On January 17, 1907, the defendant, Grant T. Whittlesey, filed a voluntary petition in bankruptcy in, and was adjudged a bankrupt by the District Court of the United States for the Northern District of Ohio, Eastern Division. On November 11, 1907, he filed his petition for discharge, which he subsequently, on March 13th, 1912, withdrew. He has not filed an answer in this case and the withdrawal of his petition for discharge, after this action was commenced, would seem to indicate that he is not to be considered in the light of an adverse defendant.

In view of these facts and under these circumstances it seems to us that the only question presented to the court is: Can this action to quiet title be maintained? An action to quiet title, surely involves the proposition that there is a *title* to be quieted. It can not be said that the action may be invoked to *create* a title

1912.]

Lookwood v. Whittlesey.

that does not exist, and then quiet the title thus sought to be created. It is admitted that the plaintiffs have absolute title, by inheritance, in common to five-sixths of this property, and it is further admitted by counsel for plaintiffs that if Grant T. Whittlesey was not indebted to the decedent, he also would have acquired complete title to one-sixth of the decedent's real estate. In this opinion all reference to the plaintiff's title will be understood as relating to their alleged title to the other one-sixth of this real estate, which the defendants, Weber and the Commercial National Bank, claim is owned by and the title in Grant T. Whittlesey.

Briefly stated the proposition is this: A dies intestate, seized of certain real estate. B and C are his sole heirs at law, but C at the time of A's death owed him more than his interest in decedent's real estate is worth. Does this fact, of itself, without recourse of any kind to legal action, *divest* C, at the instant of A's death of his inherited title to a half interest in the lands of A, and at the same instant *invest* that interest or title in B? If the indebtedness of C, *ipso facto*, at the moment A dies, divests C of his interest and title and invests that interest and title in B, without legal action of any kind, then B could maintain an action to quiet his title. But if the indebtedness of C does not, *ipso facto*, destroy and extinguish his title and interest in the lands of A, then B can not maintain an action to quiet his title, and for the simple reason that he never had a title to quiet.

The action is brought under Section 5779, Revised Statutes (11901, General Code), which provides that "an action may be brought by a person in possession, by himself or tenant, of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse interest." That is a person in possession of real estate, by himself or tenant, may bring an action against another, "who claims an estate or interest therein adverse to him"—that is, adverse to the plaintiff's estate or interest. The very language of the statute implies and presupposes that the plaintiff has an interest or estate in the lands. It will not be contended for a moment that a man may unlawfully take possession of his neigh-

bor's land, and because of the mere naked possession, maintain an action to quiet title. He may bring the action, of course, but to bring an action and maintain it or prevail in it involves the right to the relief demanded. Mere naked possession of real estate does not confer title, nor does possession ripen into title, unless it is adverse and continues for twenty-one years. Hence before this kind of an action can be maintained something more than mere possession must be shown and proven. If the statute, itself, was not clear on this point, it is made so by Sections 11903-11904, General Code, which relate to the remedy or rule of pleading in such cases. Section 11903, provides that it will be sufficient if the plaintiff pleads or states in his petition that he has a legal estate in the lands; and Section 11904 provides it will be sufficient if the defendant, in his answer, denies generally "*the title alleged in the petition.*" That the words "estate or interest," used in Section 11901, General Code, are synonymous with title is quite apparent.

By Section 14 of the Chancery act of 1831 (29 O. L., 81), it was provided that "any person having *legal title and possession* of lands" might bring this action. This section was somewhat modified from time to time, until 1870, when it was amended so as to read substantially as the first paragraph of Section 11901, General Code, now reads (Volume 67 O. L., 116, Section 557, S. & C., 1118). The statute was further enlarged in 1893 to include the right to maintain the action by a person out of possession, provided he had an estate or interest in remainder or reversion in the lands in controversy (Volume 90 O. L., 226). As thus amended the statute is now known as 5779, Revised Statutes, or 11901, General Code. Before the amendment of 1870, the Supreme Court of this state held, under the prior statutes, that title could not be quieted in favor of a party, unless he had both possession and the legal title, and it was necessary for him to allege such possession and title in his bill and prove them at the hearing (*Hubbard v. Clark*, 8 Ohio, 382; *Scott v. Douglass*, 5 Ohio, 194); that a vendee who had not acquired the legal title could not sustain a bill of peace, since no other kind of title would suffice. *Thomas v. White*, 2 O. S., 540.



1912.]

Lookwood v. Whittlesey.

The words estate, interest and title are frequently used in our statutes, but no attempt is made by statutory provision to define these terms. It seems clear that before a plaintiff can prevail in a *quia timet action* as against the world, he must show such estate, interest or title in the lands as amounts to absolute ownership. Mere naked possession in the plaintiff in the absence of paramount title in the defendant will entitle the plaintiff to a decree against such defendant, though it be illegal against others (*Mains v. Henkle*, 3 West. L. M., 593). But such a decree can not be obtained against a defendant who shows a valid, legal, or equitable interest, estate or title in the lands superior to that of the plaintiff. Under the Chancery act of 1831, to maintain this action, a plaintiff had to show legal title as well as possession. In *Avery v. Durfees*, 9 Ohio, 147, the court in answer to the question, "What is real estate," said, "If it be such an interest as can be enforced in a court of law, it is a legal interest or estate. If it be such as can only be enforced in a court of chancery, it is an equitable interest or estate"; and in *Douglass v. McCoy*, 5 Ohio, 522, the court practically held that a legal title to lands was such an interest as could be sold upon execution. Before the bill could be maintained under this act, the legal title had to be first secured in a court of law. Counsel for plaintiffs insist, however, that under the present statute, the practice is so broad that the action may be instituted in any case where plaintiff claims an interest in lands, and even to determine whether of right he ever had a title or color of title.

Granted, but if no title is shown how can it be quieted? The real purpose of the amendment of 1870 (Section 11901, General Code), will, we think, become apparent from a cursory consideration of the principles involved. For instance A, to secure a debt due B, executes and delivers to him a mortgage upon certain real estate for its full value. A really has no equity of redemption in the land. B exercises acts of ownership in relation thereto, such as to sell some of same and allotting the balance. B never actually took possession of the land, but by reason of his acts in relation to it, is constructively in possession. He may maintain a bill to quiet his title, without having first fore-

closed A's equity of redemption (see 12 O. Dec. [Reprint], 490). Here we see that B really owned the land and had paid full value for it. Under the act of 1831, not having the legal title he could not maintain the action. Under Section 11901, General Code, he can.

Again: D conveys certain real estate through a trustee to his wife, which is to be in full of all her statutory claims against his estate. The deed was not recorded and was, by consent of the parties afterwards destroyed. D dies intestate. The wife notwithstanding her consent to the destruction of the deed, may elect to keep the real estate and have her title thereto quieted under Section 11901, General Code (see *Spangler v. Dukes*, 39 O. S., 642). This case proceeds upon the theory that the deed to the wife was in legal effect a jointure during coverture which vested in the wife an estate in fee, which was not divested by the destruction of the deed. There was full consideration and title vested in the wife. She became in fact, the owner of the land, and if she had taken possession thereof after husband's death, she could maintain a bill of peace even under the act of 1831. Ownership then was essential under the old chancery act, and is still essential under Section 11901.

It would seem to be elementary that if an interest in real estate, in a given case, does not amount to absolute ownership, it is because, at the same time, there is another interest in the same land pertaining to other persons. In the case at bar, can it be said that at the death of Harriet T. Hanford, the plaintiffs had an absolute and entire ownership in all the real estate in question? We think not; for the reason that at the same time there was another interest in the same land pertaining to the defendant, Grant T. Whittlesey, which interest amounts to a legal title and may, therefore, be taken upon execution. It is also elementary that where one man may have the ultimate right of property in real estate, another the right of possession, a third the actual possession, each has a qualified or incomplete interest or estate in the land, which if transferred to and merged in one person, constitutes in such person an absolute estate or fee simple. In the case at bar the plaintiffs and the defendant, Grant T. Whittlesey, at the death of the decedent, each in com-

1912.]

Lookwood v. Whittlesey.

mon, had the ultimate right of property and the right of possession in and to this real estate, and because the plaintiffs took actual possession, it does not follow that the ultimate right of property and the right of possession of Grant T. Whittlesey to one-sixth thereof was destroyed and extinguished. The words "estate or interest" in real property as used in Section 11901, which may be quieted by petition *quia timet*, are not used in the broad sense of involving the quantity of interest, measured by duration and extent, which a person has in lands, from absolute ownership down to mere naked possession. They are rather to be taken as indicating title as defined by Coke's maxim, *titulus est justa causa possidendi id quod nostrum est* \* \* \*. A title is the just right of possessing that which is our own, \* \* \* the lawful cause or ground of possessing that which is ours. 34 Cal., 385; 81 Va., 383; 73 N. Y., 456.

A title then that can be quieted means a perfect title, for having title to land means owning it. He who has possession, the right of possession and the right of property, has a perfect title (Anderson's Dictionary; *Shelton v. Alcox*, 11 Conn., 349; 2 Bl. Com., 195, 1 Kent, 177-8). The plaintiffs have possession of the inherited interest of Grant T. Whittlesey in decedent's real estate, but we fail to see or understand how they ever acquired the right of possession and the right of property to this interest.

In the case of *Collins v. Collins*, 19 O. S., 468, it was held the action could not be maintained under Section 557 of the code (S. & C. 1118, above cited), against persons claiming a remainder in the lands contingent upon the death of the plaintiff without issue. In the opinion in this case Welch, J., in referring to the amendment of 1870, Section 557 of the code (S. & C. 1118), which provides the action might be brought by a person in possession, by himself or tenant, without the pre-requisite allegations of legal title, said:

"The only effect of this provision in the code is to substitute the plaintiff's possession for the establishment of his right by the trials at law. In other essentials the remedy by bill of peace remains the same as under the old practice."

Possession may give a plaintiff the right to bring the act on before he has established a legal title by trial at law, but if his

title is denied, he must establish it, or his action fails. The proposition is clearly stated in Bispham on Principles of Equity, Section 575, where it is said, "Bill to remove a cloud from a title" may be asserted in almost any case in which justice requires that the *title* of the *party* in possession should be quieted and "*the evidence of that title clear.*" To maintain this action, then, not only must the plaintiff show title in himself, but it must also appear that the adverse claim of the defendant is of no validity, but merely vexatious—*ne injuste vexes*—freely vex not unjustly, or as it has been said, there must be some apprehension of injury at the hands of the defendant, by the assertion of hostile claims which have no foundation in law or fact.

In *Mains v. Henkle*, 2 O. Dec., Reprint, 533, Lawrence, J., held that Section 557 of the code (S. & C., 1118), extended the general equity doctrine and gave bills of peace more of the character of bills *quia timet*, thus enabling "any person in possession, by himself or tenant, of real property, even by an equitable title in fee, or for a term to maintain a petition to quiet title." It is quite apparent, therefore, that there must be a title of some kind to the real property, which the court can merge into an absolute title or a title for a term in the plaintiff to enable him to maintain the action. The plaintiffs fully recognize this for they assert in their petition that they are not only in possession but "are the owners in common in fee simple" of the property described in their petition. They say their title is *feodum simplex*, a lawful and a pure inheritance, wholly free and clear of any qualifications or conditions, for that is what is meant by a fee simple title. A fee simple is the largest estate and the most extensive interest that can be enjoyed in land, being the entire property therein, and confers unlimited powers of alienation (4 Kent, 5, 1 Bl., 690; 1st Barb., 577; 12 Johns, 177). Let us test their alleged title to the land in question by this standard. Is the estate they claim, or was it at the decedent's death, wholly free and clear of any qualification or condition? Suppose they undertook to deed this real estate the day the decedent, Harriet T. Hanford, died, alleging that by reason of the fact that an heir who had a one-sixth interest there-

1912.]

Lookwood v. Whittlesey.

in was indebted to the decedent in a sum in excess of that interest, and therefore, had no estate in the land, that they were sole owners thereof in fee simple, would such a deed convey absolute title in and to the land? Who would take such a deed? The filing of this petition is an admission that such a deed would not convey an absolute title. They claim they have absolute title conferring full power of alienation, and yet they want it quieted. This seems inconsistent.

It seems to us that there is a vast difference between quieting *their* title and extinguishing the title of the defendant, Grant T. Whittlesey. Suppose the contention that the indebtedness of Grant T. Whittlesey in excess of his interest extinguished his title in the land, is sound, there remains the contingency that the debt may be disputed, and a qualifying condition interposed between the plaintiffs' claim and their right to enforce it. It is true, it is admitted, the indebtedness in this case is in excess of the interest, but that does not destroy the principle involved or render it less embarrassing to the claim that the indebtedness of an heir to the estate of his ancestor *ipso facto*, divests him of his title as heir if the indebtedness exceeds the inheritance.

Take another view of the case: Suppose since the death of Harriet T. Hanford the real property involved so increased in value that the indebtedness of Grant T. Whittlesey was less than one-sixth of the value of the property? In such case he would undoubtedly still have an interest therein, admitting the contention of the plaintiffs to be true.

It follows then that the most plaintiffs can justly and legally claim is that heirs of a decedent take their distributed shares *subject* to any indebtedness they may have owed to the decedent, during his lifetime. This, we understand to be the well settled law of this state. In other words, if an heir owed the decedent, the amount so found due decedent's estate will be a legal as well as equitable set-off against his interest in the estate of the decedent.

It is admitted that this is purely an equitable action. As a general rule a court of equity will not entertain jurisdiction of a petition to quiet title or remove a cloud where there is a plain

adequate and complete remedy at law. This doctrine is so well established as to be elementary, and citation of authorities or precedents supporting it would be wholly superfluous.

Have the plaintiffs, or did they have a plain adequate and complete remedy at law? Surely it will not be denied that the administrator not only had a right, but it was his duty to have brought an action against Grant T. Whittlesey on his indebtedness in a court of law, obtained judgment against him and levied upon his interest in the lands described in the petition, and sold that interest to satisfy that judgment. Suppose this had been done, such judgment obtained and such levy made, would the plaintiffs be heard to say that the lands could not be sold because the whole title was in them and that Grant T. Whittlesey had no interest in the land? The answer to this question, we think, conclusive of the point or question involved. If this real estate could be sold to satisfy a judgment against Grant T. Whittlesey in favor of the estate of the decedent, it follows inevitably that the plaintiffs did not have fee simple title to the whole of the real estate, at the time of the decedent's death. We believe there is no escape from this conclusion. That the indebtedness of Grant T. Whittlesey is a part of the assets of the decedent's estate will not be denied. See Woerner, American Law of Administration, Section 71, where it is said:

"The true principle seems to be that a debt owed by an heir, constitutes part of the assets of the estate as much as that of any other debtor, for which he should *account* before he should be allowed to receive anything out of the other assets."

The true rule then seems to be that a debtor heir must *account* to the decedent's estate and his interest will be *subject* to the payment of his indebtedness. Nor can it be said that the creditor estate takes precedence of other creditors of the debtor heir. If this were true, the plaintiffs and the administrator could have become parties to the suits brought by the defendants, Weber and the Commercial National Bank, and prevented the order of sale from issuing or at least availed themselves of the proceeds of such sale, and thus render the bringing of this action wholly unnecessary. The real purpose of the rule, which

1912.]

Lookwood v. Whittlesey.

requires an heir of a decedent to take his distributive share, subject to any indebtedness he may have owed to the decedent, is to secure equality of inheritance among all the heirs, for it has been held "it is inequitable and at variance with the policy, defined in our statutes to permit one to share in an estate, which is diminished by his default and to the prejudice of those, whose rights are equal to his own" (62 O. S., 619). The debtor heir can not share in the estate equally with the others until he has *accounted* for his indebtedness. But it will be noticed from the language used by Shauck, J., in 62 O. S., 619, that the rights of the other heirs are only equal to, not greater than the debtor heir. This does not mean, therefore, that a diligent creditor of the debtor heir may not attach or levy upon the interest of the debtor heir, before that interest has been subjected by the estate or the other heirs, or before the debtor heir had accounted to the estate for his indebtedness. To hold otherwise would open wide the door to collusion and fraud.

Indeed this action is an attempt to accomplish what could not be accomplished in the suits prosecuted by the other defendants, above named, or by a creditor's bill, if they had reduced their claim to judgment, a thing easily done even yet, as Grant T. Whittlesey is apparently ready and willing to confess judgment in favor of the administrator or the plaintiffs.

Again, if there were no debts against the decedent's estate and administration was unnecessary, the plaintiffs might bring or have brought an action in partition and in that action subjected the interests of Grant T. Whittlesey in this estate to the payment of his indebtedness to the estate. That is his indebtedness could be, in such case, set off against his interest in the estate or the land. We have diligently searched for a precedent or authority in *pari passu* with plaintiffs' contention and failed. We do not believe that a case involving the precise question here submitted has ever been decided. For the reasons indicated, the petition will be dismissed and the defendants given judgment for costs.



**DECISIONS AND OPINIONS DISTINGUISHED.**

Common Pleas Court of Hamilton County.

THE COLERAIN BUILDING & LOAN COMPANY V. WILLIAM  
H. HOSEA ET AL.

Decided, August 1, 1912.

*New Trial—Time for Filing Motion for—Runs from the Decision in the Case—Not Necessarily from Announcement of the Opinion of the Court—Section 11578.*

Whether the remarks of a court at the end of a case—oral or in writing—are its decision, should be stated by the court—if these remarks are merely the court's opinion, as the basis of a finding, they are not the court's decision and no entry is necessary. But if such remarks are intended as a decision under the code, the court should say so and cause immediately an entry to that effect to be made of record, so that counsel may thus be advised definitely that time has begun to run.

*Bates & Meyer*, for the motion.

*George W. Harding*, contra.

DICKSON, J.

A decision in this case was entered June 6th, 1912. On June 8th, 1912, a motion for a new trial was filed. The opinion of the court was rendered some time prior to June 1st. Application has been made to strike the motion for a new trial from the files because "the same is irregular and contrary to law in that it was filed more than three days after the oral pronouncement or decision of the court in this case."

Section 11578 of the General Code provides:

"The application for a new trial must be at the term the verdict, report or decision is rendered, except for the cause of newly discovered evidence material for the party applying, which he could not with reasonable diligence discover and produce at the trial. The application must be made within three days after the verdict or decision is rendered unless he is unavoidably prevented from filing it within such time."



1912.]

Building Association v. Hosea.

Under the code the decision of a court corresponds to the verdict of a jury. From such there follows a judgment, and the time begins to run from the rendition of the verdict or the decision, and the motion for a new trial is between the two.

Are the verdict of a jury and the decision of a court the same? And what is meant by the opinion of the court, and must the opinion be oral or written?

Section 11455 of the General Code provides that the verdict must be reduced to writing and signed by the foreman, and is noted on the record and is filed with the papers. The opinion of a court may be oral or written. Hence there can be no requirement that it be signed, that it be filed or entered. If the decision of a court rise to the dignity of the verdict of a jury, it too should be in writing and signed by the court, and be noted on the record.

It is all wrong to consider the opinion of a court its decision. It has usually no mark of identification as to time or authority. If an opinion of a court be intended to be its decision the court at the time of giving the same should so state and an entry on the record of the court indicative thereof should be then made—something tangible to warn counsel that time has begun to run.

In the case of *The City of Cincinnati v. John Kilgour*, 13 C.C. (N.S.), 415, in the absence of any notice to the contrary, the circuit court held that that oral decision was considered the decision contemplated by the code. But such is not this case.

In the case at bar the concluding words of the written opinion are—"The decree will be accordingly." The record here contains no mention of the opinion. There is nothing of record upon which to found a motion for a new trial. There is no record of the time when the opinion was rendered. The member of this court which rendered the opinion in this case renders this opinion and knows that his opinion was not the decision contemplated by him and the code, and so stated when he said in the opinion, "The decree will be accordingly."

Much is often in an opinion as an obiter—not intended to be a part of the record. Often in an opinion the court gives a litigant an option to be exercised by him—as for example, in

alimony—so much per month for so long, or so much in gross now. Such an opinion is not the decision. The decision is made after the option is exercised or refused to be exercised.

Under the code as worded the only course just to all is for the court to state whether what has been said by it is an opinion as a guide to a decision or a decision. If it be a decision let it be noted by endorsement by the judge and noted on the record, and let it thus become the duty of counsel to insist upon such action by the court at the time. The various steps in procedure should not be uncertain.

The motion to strike from the files will be overruled.

---

### **MANDAMUS TO COMPEL AWARD OF BID FOR PUBLIC WORK.**

Common Pleas Court of Licking County.

THE STATE OF OHIO, EX REL GEORGE W. LANE, V. THE BOARD OF  
COUNTY COMMISSIONERS OF LICKING COUNTY.

Decided, April Term, 1912.

*Bids and Bidding—Mandamus to Compel Award by County Commissioners—Necessary Allegations—Discretion of Board in Making an Award for Public Work.*

1. Inasmuch as compliance by county commissioners with the provisions of Section 2343 is a condition precedent to the making of a valid contract for a public improvement, a petition in mandamus to compel the letting of a contract to the relator will not lie in the absence of allegations that these conditions precedent have been complied with.
2. The discretion reposed in county commissioners as to who is the lowest or best bidder, precludes a court from granting a writ of mandamus for the award of the contract to some other bidder, in the absence of any allegation or showing of abuse of such discretion.

*Wayne Collier and Fitzgibbon & Montgomery, for plaintiff.*

*A. A. Stasel and Phil B. Smythe, contra.*

1912.]

State, ex rel, v. County Commissioners.

SEWARD, J. (orally).

This case is submitted to the court upon a demurrer to the petition, which is for a writ of mandamus to require the commissioners to let a contract to the relator, George W. Lane. The petition is brief, and I think it is too brief to warrant the court in making the order. I think the proceedings of the commissioners should be set out in the petition. At any rate the demurrer is well taken under Section 2343, which provides what the commissioners must do before letting the contract, and if they have not done that, the contract would be illegal and utterly void. The pleader must bring himself within the conditions of the statute, showing that the commissioners have complied with this section, before the court would be authorized to issue a writ of mandamus, compelling the letting of the contract to the relator. That section provides:

“When it becomes necessary for the commissioners of a county to erect or cause to be erected a public building, or substructure for a bridge, or an addition or alteration thereof, before entering into any contract therefor or repair thereof, or for the supply of any materials therefor, they shall cause to be made by a competent architect or civil engineer the following: full and accurate plans showing all necessary details of the work and materials required, with working plans suitable for the use of mechanics or other builders in the construction thereof, so drawn as to be easily understood; accurate bills, showing the exact amount of the different kinds of material, necessary to the construction, to accompany the plans; full and complete specifications of the work to be performed showing the manner and style required to be done.”

None of those matters are set up in the petition, and I think they are conditions precedent and should be alleged in the petition; and I am inclined to think that it would be interfering with the discretion of the board of county commissioners to issue this writ and make it peremptory.

Section 2346 provides:

“In their advertisement, the commissioners shall invite bidders to make proposals for furnishing all the materials and performing all the work, or for such parts thereof as bidders deem

proper, and state the time when and the place where bids will be opened and contract awarded. At such time and place, or at a time to which they shall publicly adjourn the consideration thereof, they shall publicly open, read and examine the proposals made, and award the contract for furnishing the material and for the erection of such superstructure to the person or persons giving security as required by the provisions of this chapter who is the lowest or best bidder.”

The lowest or best bidder—using the disjunctive “or.” Who is the lowest or best bidder or bidders, considering price, plan, material and method of construction?

The commissioners are allowed a certain discretion. The lowest bidder may not be the best bidder. He may not be a man the commissioners ought to trust, or they would be willing to trust for the proper performance of the duties which are involved in the bid. At any rate, the court finds that it is necessary to allege the precedent conditions mentioned in Section 2343; they are not so alleged, and for that reason, and for the reason that the court thinks that there is a certain discretion allowed the county commissioners, which the court can not control under the laws of Ohio, this demurrer should be sustained. It may be so ordered, and exceptions taken.

1912.]

Wuest v. Cincinnati.

**INJURY FROM FALLING INTO HOLE IN THE STREET.**

Common Pleas Court of Hamilton County.

MARY WUEST V. THE CITY OF CINCINNATI.

Decided, June, 1912.

*Municipal Corporations—Liability of, for Injury from Defect in Street—  
Question of, One for the Jury—Pleading—Trial.*

1. In an action for injuries due to a fall caused by a hole in the street, the question whether the hole was of sufficient size to constitute a dangerous defect, if it appears to be one as to which reasonably prudent men might disagree, will be left to the jury for determination under all the circumstances of the case.
2. The fact that the evidence indicates that the hole was large does not preclude recovery on the ground of contributory negligence, where it appears that at the time of the accident the hole was filled or partly filled with freshly fallen snow.
3. An averment in the answer that the plaintiff was injured through her own negligence and carelessness is not an averment of contributory negligence.
4. A court has inherent power to grant leave to file a reply at any stage of the proceedings, and where a case is tried on the theory that a reply has been filed traversing the allegations of the answer, judgment will be entered on the verdict as though a reply had been in fact filed before the verdict was returned.

*Dempsey & Nieberding*, for plaintiff.*Coleman Avery*, Assistant City Solicitor. contra.

GORMAN, J.

On motion for new trial.

This is an action to recover damages against the city of Cincinnati for personal injuries—a broken leg—alleged to have been caused by the negligence of the city in permitting a street crossing at Hatmaker and Burns streets to be and continue out of repair and in a defective and dangerous condition. Plaintiff's injuries occurred on January 13, 1909. Upon a trial of the case a verdict was rendered for the plaintiff for \$700. A motion for a new trial is now made upon all the grounds set out in the stat-

ute; and also a motion for a judgment notwithstanding the verdict, for three reasons: first, that the petition of the plaintiff does not state facts sufficient to constitute a cause of action; second, upon the pleadings, petition and amended answer the defendant is entitled to a judgment; third, upon the admitted facts of the case defendant is entitled to a judgment.

In the argument before the court, counsel for the city of Cincinnati appeared to rely wholly upon the motion for a judgment for the reasons stated.

The petition alleged and the evidence tended to show that the defect in the street where plaintiff was injured consisted of a hole at said crossing about five feet in length, one foot in width and about four inches in depth. The evidence tended to show that the hole had been there for five or six months prior to the time when plaintiff was injured. On the morning of the injury as plaintiff was crossing the street she fell or stepped into this hole, thereby breaking her leg. The evidence tended to show that there had been a fall of snow either that night or early that morning before the plaintiff attempted to cross and that this snow covered up the hole to an appreciable extent and tended to prevent the plaintiff from seeing it.

It is claimed under the rule laid down in *City of Dayton v. Glaser*, 76 O. S., 471; *Gibbs v. Village of Girard*, 14 C.C.(N. S.), 81; *Betz v. City of Yonkers*, 148 N. Y., 67; *Hamilton v. Buffalo*, 173 N. Y., 72, and other cases cited by counsel for defendant, that, as a matter of law, the size of the hole in the crossing of this street was not a dangerous defect.

The court is of the opinion that the question of whether or not a hole in the street is a dangerous defect, is one to be determined by the jury under all the circumstances of the case, unless the alleged defect is of such a slight character that reasonable and prudent men would not differ as to its being dangerous. If the dimensions of the hole are of such a character that reasonable men might reasonably differ as to whether or not it was a dangerous defect, then it is a question for the jury and not for the court to determine whether or not the defect was dangerous.

Furthermore, in this case it is claimed that if the hole was of the dimensions claimed by the plaintiff, then it was an obvi-

1912.]

Wuest v. Cincinnati.

ous defect which she failed to avoid, and therefore she was guilty of contributory negligence which precludes a recovery. The evidence as stated tends to show that the hole was filled or partly filled with snow and that on the morning when plaintiff was injured the hole was not plainly obvious to one crossing the street at the time and place where the plaintiff was injured. It is also urged that because plaintiff had passed that crossing on many occasions prior to her injury, therefore she must have known of the existence of the hole and the presumption is that she knew of its existence. Her own testimony is that she did not know of the existence of the hole. The testimony of other witnesses offered for the plaintiff tended to show that the hole existed for five or six months prior to the date of plaintiff's injury.

If the evidence showed that the hole was plainly obvious even though plaintiff did not see it, then the court would be disposed to hold that she was guilty of contributory negligence in failing to avoid an obvious danger, and could not recover.

The court is of the opinion that the motion for a judgment should not be granted upon the ground that the pleadings and the facts show that the plaintiff had no cause of action. We think that the question of whether or not the hole was a dangerous defect in the street in view of the testimony showing its size and the allegations of the petition giving its dimensions was a question for the jury. It was also a question for the jury to determine under the evidence whether or not the hole was plainly obvious, in view of the plaintiff's own testimony that she did not see it, and the attending circumstances of the snow filling or partly filling the hole.

It is further urged that there was no reply filed to the defendant's answer charging plaintiff with contributory negligence, and that therefore on this ground the defendant is entitled to a judgment because the averments of contributory negligence are admitted in the absence of a reply traversing these averments.

The petition in this case was filed July 26, 1909, and an answer was filed August 11, 1909, in which no claim of contributory negligence was set up, but only the claim that the plaintiff was in-

jured by reason of her own negligence and carelessness. This is not an averment of contributory negligence.

An amended answer was filed on June 5, 1911, almost two years after the answer, by leave of court, but counsel for the plaintiff stated on the trial of the case that they were unaware of the amended answer having been filed setting up contributory negligence. The case proceeded to trial without any objection being made by counsel for defendant to a reply being filed to the defense of contributory negligence. The plaintiff appeared to have been unaware of this defense and no objection was made by counsel for the defendant to the absence of a reply until the plaintiff closed her testimony and rested her case. Thereupon the defendant moved the court for an instructed verdict or for a judgment upon the pleadings, and called the court's attention and the attention of counsel for plaintiff to the absence of a reply: The court overruled the motion and at the same time upon the request of counsel for the plaintiff, granted leave to file a reply traversing the averments of the defendant's answer touching contributory negligence; to all of which counsel for defendant excepted.

It is now claimed that the court erred in giving leave to file a reply at the time it was filed, and that therefore the case should be now considered as though no reply had been filed.

The court is of the opinion that in the due administration of law and to the end that justice may prevail, the court has inherent power at any stage of the proceedings, to grant leave to the plaintiff to file a reply. The defendant can not be prejudiced thereby because if new matter is set up in the reply, he may be granted an opportunity to meet the same by having the case continued to another day; but, if the reply is simply a denial of a substantive defense, then the defendant has not been prejudiced by the court's leave given to file a reply traversing the averments of such a defense. Furthermore, it is provided in Section 11364, General Code, that:

"In every stage of an action, the court must disregard any error or defect in the pleadings or proceedings, if it does not affect the substantial rights of the adverse party."



1912.]

Wuest v. Cincinnati.

The case was heard and tried as though there had been a reply filed. Under the circumstances the court is of the opinion that counsel for defendant waived its right to have a reply filed. If it desired to preserve its rights it could have made a motion for a judgment on the pleadings before beginning the trial, or should have called the attention of the court to the fact that no reply had been filed.

In the case of *C., C., C. & St. L. Ry. Co. v. John McKelvey*, 12 C. C., 426, 429, it is held in the first paragraph of the syllabus:

“It is not reversible error for a court in a case where a reply ought to have been and was not filed to permit the filing of a reply after the testimony was substantially closed, and when testimony in rebuttal was being introduced by the other party, where the case had been tried previously without objection and as it would have been tried had a reply been filed before the trial commenced.”

After leave was given to file a reply and the reply was filed, counsel for defendant did not ask leave to introduce any evidence, but rested upon the testimony offered on behalf of the plaintiff. Under these circumstances the court is of the opinion that it would be a substantial denial of justice to the plaintiff to enter a judgment against her upon the pleadings on the ground that she had failed to file a reply, because this was a neglect of her counsel, for which she should not be punished.

Furthermore, the court is of the opinion that defendant was not prejudiced by the failure to have the reply filed before the case went to trial, in the absence of the matter being brought to the attention of the court. Presumably, counsel prepared to try the case upon the theory that the plaintiff was guilty of contributory negligence and that it would be incumbent upon it to establish that fact. The defendant does not show that it was taken by surprise or prejudiced in any way by the failure of the plaintiff to traverse its averments in reference to the contributory negligence in question. Therefore, the court is of the opinion that, as far as the motion for a judgment is concerned, it should be overruled because neither the pleadings nor the evidence warrant the court in saying as a matter of law that the plaintiff had no cause of action, or that the defect in the street

was not such a one as made the street reasonably unsafe for travel in the ordinary modes of travel.

The court is further of the opinion that the case was fairly tried and fairly submitted to the jury and the jury having found from the evidence that there was a dangerous defect in the street, and that the defendant had constructive notice thereof, and further that the plaintiff's injuries were not the result of slipping and falling by reason of the snow, the verdict in this case will be allowed to stand, and the motion for a new trial will be overruled as well as the motion for a judgment.

---

### FINAL JURISDICTION OF MAGISTRATES IN CRIMINAL CASES.

Probate Court of Stark County.

THE STATE OF OHIO V. EDWARD A. POHLMAN.

Decided, September, 1912.

*Jurisdiction—Of Magistrates is Final in Criminal Cases, When—Probate Court Shorn of Jurisdiction on Error—Effect of the Enactment of Section 13432 as it Now Stands.*

Section 13432, General Code, gives final jurisdiction to justices of the peace in cases in which imprisonment is a part of the punishment and a jury is not waived, and where it is attempted to carry such a case to the probate court a motion to discharge the accused will lie.

*Charles Krichbaum, Hubert C. Pontius and W. O. Werntz, for the state.*

*Charles C. Upham and James L. Amerman, contra.*

Bow, J.

In this action the defendant, Edward A. Pohlman, was arrested upon a warrant issued by W. S. Rinehart, a justice of the peace of Canton township, upon an affidavit filed in said justice court, charging in substance that the defendant on or about the 4th day of May, 1912, in the county of Stark and state of Ohio, did unlawfully keep and exhibit for gain, and to win or gain

1912.]

State v. Pohlman.

money, certain gambling devices or apparatus commonly known as faro tables, roulette wheels, apparatus for selling pools on races and ball games, faro bank, playing cards, poker chips, telegraph outfit, form sheets and betting books, contrary to the form of the statute in such case made and provided. This affidavit was filed under Section 13066 of the General Code of Ohio, which reads as follows:

“Whoever keeps or exhibits for gain or to win or gain money or other property, a gambling table, or faro or keno bank, or gambling device or machine, or keeps or exhibits a billiard table for the purpose of gambling, or allows it to be used, shall be fined not less than \$50 nor more than \$500 and imprisoned not less than 10 days nor more than ninety days and shall give security in the sum of \$500 for his good behavior.”

The transcript filed in this case certifies that the defendant was arraigned before the justice of the peace and that he entered a plea of not guilty, and that on the 9th day of May, 1912, the parties being present, trial was had, witnesses sworn and examined on behalf of the state, and it was then and there ordered and adjudged by the justice of the peace that said defendant, Edward A. Pohlman, be held to appear before the Probate Court of Stark County, Ohio, on the first day of the next term thereof, to answer the said charge. Bail was fixed at \$300, which was given as required. Thereupon said transcript and original papers were filed in this court, and the case duly docketed and assigned for trial. Whereupon the defendant, by his counsel, filed a motion for a dismissal of this action for the reason that this court is without jurisdiction in said case; and counsel base their contention upon Section 13432 of the General Code, which reads as follows:

“In prosecutions before a justice, police judge or mayor, when imprisonment is a part of the penalty, if a trial by jury is not waived, the magistrate, not less than three days nor more than five days before the time fixed for trial, shall certify to the clerk of the court of common pleas of the county that such prosecution is pending before him.”

And Section 13433 makes it the duty of the clerk upon receiving such certificate from the justice of the peace, to proceed

in the presence of representatives of both parties and draw from the jury box twenty names and certify such names to the magistrate who shall issue a venire therefor. And subsequent sections provide the procedure of trial from that period forward.

Counsel for the defendant contend that under the sections of the General Code last referred to, the justice had final jurisdiction of this case inasmuch as imprisonment was a part of the penalty, and the defendant not waiving a trial by jury, the justice should have proceeded as the law requires, and impaneled a jury and tried the defendant upon the charge, and if found not guilty discharge him, or if found guilty inflict the penalty, counsel basing their contention upon the claim that said Section 13432 and subsequent sections, are of a general nature and have general application.

It is contended by counsel for the state that Section 13432 is of special application and not general, and applies only to those special prosecutions mentioned in Section 14323 of the General Code, which prosecutions mentioned in said Section 14323 are, in substance, offenses against the food laws, cruelty to animals and children, non-support, employment of minors, intoxicating liquors, offense against the pharmacy and drug laws, etc., and base their contention upon the claim that Section 13432 is practically a re-enactment of Section 3718a of the Revised Statutes of Ohio, which reads "Any justice of the peace, police judge or mayor, of any city or village, shall each have jurisdiction within his county in all cases of violation of the laws, to prevent the adulteration of food and drink, the adulteration or deception in the sale of dairy products, or any other food and drugs and medicines, and any violation of the law of cruelty to animals or children, etc., *in any such* prosecution where imprisonment may be a part of the punishment, if a trial by jury be not waived, the said justice of the peace shall," and then the section goes forward and makes the same provision as to the mode of procedure as is now laid down in Section 13432 of the General Code. Counsel for the state further contend that it was clearly the intention of the Legislature that the present Section 13432 should apply to those special cases and not to all cases of prosecutions where imprisonment is a part of the pen-

1912.]

State v. Pohlman.

alty; and that because of such special application it could in nowise be held to apply to the case at bar, and that the motion should be overruled. And counsel for the state further contend that this court should look at the intention of the Legislature and examine the history of this section in order to place upon it a proper and an intelligent construction.

I have taken considerable time in the examination of this question since it was presented; I have taken this time because I realize the very great importance of the question submitted; because this statute, if general, is the one which governs the procedure in all cases where imprisonment is a part of the penalty in every county in this state. There has been some claim made on the part of the state that to give Section 13432 general application would be in conflict with Section 13422 and 13511 of the General Code, and that by reason of such conflict the court should construe the section as having special application. A careful examination of the three sections referred to discloses that the three taken together provide for all classes of criminal prosecutions, and the section under consideration can be given general application and not be inconsistent or in conflict with the other sections of the General Code.

The codifying commission, for some purpose or other, took Sections 306a and 3718a of the Revised Statutes and divided them into paragraphs and made Section 13423, under "Title II Criminal Procedure, Chapter I Jurisdiction;" they then sandwiched in Chapter II under the title, "Justices of the Peace," and in that chapter appears Sections 13426 to 13431 inclusive of the General Code. They then create Chapter III under the title, "Justices, Police Judges and Mayors;" and the first section appearing in that chapter is 13432, the one under consideration. And not content with separating it by titles, chapters and numbers from Section 13432, they leave out the words "*any such*," which were contained in the old section, and now instead of reading, in any such prosecutions, etc., it reads, "in prosecutions," etc. If a court in the construction of this statute had a right under the established rules of construction to go back and inquire into the intent of the Legislature in the passing of this act, or the intent of the codifying commission in its

codification, with the segregation of these sections, and the leaving out of those important words, could the court say that they intended differently than they themselves have said? But under the rule laid down by the Supreme Court in the 18th Ohio State, page 456, in the case of *Woodbury & Co. v. Berry*, has the court any right to look to the purpose or intent of the codifiers or of the Legislature? In the syllabus of that case the court lays down this rule:

“Where the words of a statute are plain, explicit and unequivocal, a court is not warranted in departing from their obvious meaning, although from consideration arising outside of the language of the statute, it may be convinced that the Legislature intended to enact something different from what it did in fact enact.”

In the opinion on page 462, the court says, after reviewing certain circumstances showing the act to be really absurd:

“These considerations and a comparison of the provisions of these sections of the statute, as they stand with those of the statute which was superseded and repealed by the Code of Civil Procedure, not only suggests the conjecture but convince us of the fact, that the words *other than the county*, or some equivalent phrase, must have been by accident or oversight of the draftsman of the bill to establish a code of civil procedure, or of the clerk who engrossed it omitted before the words, ‘from which the execution issued’ in Section 455. But notwithstanding all this, *ita lex scripta est*. The language as it stands is clear, explicit and unequivocal. It leaves no room for interpretation, for nothing in the language employed is doubtful. We are satisfied, by consideration outside of the language, that the Legislature intended to enact something very different from what it did enact, but it did not carry out its intention and we can not take the will for the deed. It is our legitimate function to interpret legislation, but not to supply its omission.

“When the law is clear and explicit and its provisions are susceptible of but one interpretation, its consequences if evil can only be avoided by a change of the law itself, to be effected by legislation and not by judicial action. Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the Legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction.” *Sedgwick on Statutory and Constitutional Law*, 231.

1912.]

Cloud v. Bank et al.

“Courts ‘must not even in order to give effect to what they may *suppose* to be the intention of the Legislature, put upon the provisions of a statute a construction *not supported by the words*, even although the consequences should be to defeat the object of the act.’ ”

That case was affirmed and followed in the 73d Ohio State, page 120, and endorsed by the Supreme Court of the United States in the 113th U. S. Report, page 310, and it is the rule the courts of Ohio are bound to follow.

Applying that rule to the case at bar, this court is compelled to and does find that Section 13432 of the General Code is of general application; that it applies to the case at bar; that the justice of the peace had final jurisdiction; that this court has no jurisdiction, and the motion will be sustained and the defendant discharged.

I fully appreciate the importance of this holding and the expense that may attend certain prosecution and the almost absurd consequences that may follow in some cases, but I believe it to be the only interpretation that can possibly be placed upon that section by any court of this state in the light of the foregoing authorities.

---

### **ESTOPPEL AGAINST CHANGED INTERPRETATION OF AGREEMENT.**

Common Pleas Court of Hamilton County.

FRANCIS H. CLOUD V. THE MILLIKIN NATIONAL BANK OF DECATUR, ILL., AND HENRY W. HAMANN, SHERIFF OF HAMILTON COUNTY.

Decided, June 27, 1912.

*Release—Of an Endorser from Liability—Claimed under an Agreement Perhaps Purposely Made Indefinite—Estoppel—Injunction Against Levy of Execution.*

Where one of two parties secures from the other the partial performance of an indefinite agreement, and in so doing is aware of the understanding the party performing has as to the conditions em-



bodied in the agreement, the said party is thereafter estopped, at least until the party performing has been placed *in statu quo*, from denying that the agreement should be as understood by him, and upon full performance he is entitled to all the benefits flowing therefrom.

*Waite & Schindel*, for plaintiff.

*Hugh Crea, R. M. Scott and Scott Bonham*, contra.

HUNT, J.

This is an action to enjoin the sale of the real estate of the plaintiff in Hamilton county, upon which a levy had been made in favor of the defendants, for the reason that the levy and writ upon which the sale is to be made is irregular and void, and for the further reason that the judgment upon which the execution was issued was obtained in pursuance of an agreement that no execution against the plaintiff was to be issued.

On June 1, 1906, in the Court of Common Pleas of Guernsey County, Ohio, the Millikin National Bank of Decatur, Illinois, commenced an action against J. W. Campbell and F. H. Cloud upon certain promissory notes indorsed by said defendants and a third person named Martin. After sundry motions, demurrers, amendments of petition and answers filed by F. H. Cloud, on June 6, 1908, F. H. Cloud withdrew his answer and J. W. Campbell being in default for answer or demurrer, a judgment was rendered against J. W. Campbell and F. H. Cloud in the sum of \$20,307, with interest at five per cent. from May 4, 1908. On July 30, 1908, J. W. Campbell filed a motion to set aside such judgment, and on February 2, 1910, withdrew such motion. On June 23, 1909, execution against F. H. Cloud had been issued to Hamilton county.. Upon such writ or a similar alias writ a paper levy was made on the F. H. Cloud real estate and return made. Thereafter a writ *vendi exponas*, or writ for the sale of such property, was issued to Hamilton county, but prior to advertising the sale thereunder this action on December 10, 1909, was brought to enjoin such sale.

Plaintiff claims that such judgment was permitted by him to be rendered by reason of an agreement, made with plaintiff in such action, that no execution was to be issued against this



1912.]

Cloud v. Bank et al.

plaintiff upon such judgment, in consideration of the withdrawal of said answer and the payment of the sum of \$4,000.

The facts pertaining to such alleged agreement are substantially as follows:

The plaintiff's liability upon the notes sued upon, if plaintiff was liable thereon, as between all the parties liable thereon, was claimed to be as a surety, and if contribution were enforced he would ultimately have had to pay only one-third, or at most one-half. Cloud was known to be responsible; Campbell was supposed to be; Martin was probably not financially responsible.

The Millikin Bank was represented by its attorney, Mr. Crea, and also by a local attorney in Cambridge, Guernsey county. Cloud had an attorney in Cincinnati and also in Guernsey county. The case came up for hearing in different forms several times at Cambridge, and all such attorneys at one or more of such times were there; also Mr. Cloud himself. Mr. Cloud was very anxious to make some arrangement by which he could on easy terms pay one-third and be released from further liability. The right and methods of so doing, without prejudice to the bank recovering from others, were discussed and urged upon the bank's attorneys, but they could not see their way to do so, even if the bank should consent, which consent was doubtful under the circumstances. Mr. Crea, the attorney of the bank, was not adverse to so favoring Mr. Cloud if the bank would consent. Such negotiations were continued while awaiting hearings in court, at hotels, on railroad trains and by letter. Such negotiations were begun and pushed on the part of Mr. Cloud. It is not claimed that anything resulted therefrom until after May 6, 1908, when Mr. Cloud from Cincinnati wrote a letter directly to Mr. Crea at Decatur, offering \$4,000 cash and a note bearing five per cent., to be paid within such time as would enable him to dispose of securities. That the \$4,000 and the note were together to amount to one-third of the entire liability, is not stated in the letter, but may be assumed from previous negotiation. This letter was taken by Mr. Crea to the bank. A telegram was sent to Mr. Cloud, and Mr. Crea went to Cincinnati to see Mr. Cloud. He there had a talk with Mr. Cloud, but the evidence is not such that any clear agreement is affirmatively

established thereby, although both Mr. Crea and Mr. Cloud thereafter assumed that an understanding had been reached involving the rendering of a judgment against Cloud and Campbell for the entire amount due and the immediate payment by Mr. Cloud of \$4,000. Mr. Cloud was eager to infer that, by agreement made, he would be exempted from paying the entire amount of the judgment, and Mr. Crea in order to get the judgment entered, was willing that Mr. Cloud should infer such to be the result. Then followed some correspondence between Mr. Waite, Mr. Cloud's Cincinnati attorney, and Mr. Crea, in which an agreement seems to have been assumed, but such correspondence does not disclose what it was. It shows, however, that Mr. Cloud was still interested in the amount of the judgment to be rendered.

On June 6th, when Mr. Cloud's answer was withdrawn and the judgment entered, there was some talk between Mr. Cloud's attorney and Mr. Crea in which an agreement was again assumed, and the immediate payment of \$4,000 by reason thereof expected by Mr. Crea, but the full terms of the agreement were not mentioned nor discussed. Apparently it was not deemed advisable at any time to discuss the full terms of the agreement, for fear that there might be a disagreement if an attempt was made to make it definite, or for fear that such agreement, if known, would interfere with the taking of the judgment against Mr. Campbell. The full terms of the agreement, if any, were therefore apparently left entirely to the custody of Mr. Cloud and Mr. Crea, and each of them permitting its terms to be assumed by the other. Manifestly, however, the bank secured the withdrawal of the answer of Mr. Cloud and the entering of the judgment upon some agreement assumed to exist between Mr. Cloud and Mr. Crea. A few days after the entering of the judgment Mr. Cloud, then in Michigan, forwarded to Mr. Crea a check for \$4,000. In his letter of June 14, 1908, with which the check was sent, he refers to a communication just received from Mr. Waite, by reason of which he sent the check, but such communication simply refers to an agreement between Mr. Cloud and Mr. Crea, without giving its terms. Mr. Cloud's letter, although Mr. Cloud is a man of affairs, intelligent and careful, refers to the

1912.]

Cloud v. Bank et al.

condition of the agreement only in vague terms; in fact, the whole case presents a situation where the interested parties assumed an agreement, but purposely avoided putting it in any clear and definite terms and in any permanent form. It is, therefore, natural under the circumstances that the parties thereto now have difficulty in establishing such terms, now that they themselves are interested in establishing contrary conditions. It is not probable that Mr. Cloud would have sent \$4,000 without some understanding, at least on his part, that it was to secure the doing or not doing of something to his benefit, nor is it probable that the plaintiff in receiving and retaining such check would suppose that Mr. Cloud would send it simply as a credit upon a judgment of over \$20,000, recently rendered against him. Neither the bank nor Mr. Crea, by letter or receipt indicated to Mr. Cloud the terms upon which the \$4,000 was received and retained.

Since the rendition of the judgment, Campbell's financial responsibility has become doubtful, and, although the defendant admits that it agreed to do what they could to enforce the judgment against him, it has done nothing further than have an execution issued against him and return made of "no goods," etc.

All parties were either intelligent business men of experience, or experienced lawyers accustomed to putting agreements involving large pecuniary interests, intended to be binding and to control their own and others actions beyond the immediate future, in some written form for their own use if not for legal evidence. It is therefore astonishing in the absence of a formal agreement, if there was any real verbal agreement, that Mr. Cloud should not have mentioned the terms under which his \$4,000 check was sent, in the accompanying letter, or that the bank in receiving the check and knowing of Mr. Cloud's anxiety to escape from paying the whole indebtedness, should not have then notified Mr. Cloud of the conditions under which the check was received. That Mr. Cloud expected and that the bank knew that Mr. Cloud expected to secure some advantage along the lines of previous negotiations by the withdrawal of his answer and the entering of the judgment and the payment of \$4,000, is manifest.

Having secured the performance, or partial performance by Mr. Cloud of an assumed agreement, although the conditions thereof may have been erroneously inferred by Mr. Cloud, yet such inference of Mr. Cloud being known to the bank when they secured such performance, the bank is now estopped from denying the agreement to be such as it knew Mr. Cloud assumed it to be, at least until Mr. Cloud is put in *statu quo*. This is now probably impossible, because of the delay of the bank in doing "all it could" to enforce payment by Campbell.

If such agreement were entirely executory on both sides the court in the absence of sufficient evidence would simply find that the agreement was not established, but because of its performance or partial performance, there is still an agreement although not established affirmatively and not necessarily the agreement which Mr. Cloud now claims, but which the bank must have known that Mr. Cloud then assumed, which the bank is now estopped from denying. From all the probabilities of the case such agreement is that contained in Mr. Cloud's letter of May 6th, in connection with the prior negotiations as to the paying of one-third. If there was any other agreement more favorable to Mr. Cloud, he has the burden of proof and has failed to establish it. The only agreement which the bank is now estopped from denying contemplates the payment of one-third of the judgment payable, \$4,000 cash, and the balance with five per cent. within such time as Mr. Cloud could have disposed of his securities. Such securities are presumed to have been marketable securities and such time may therefore be assumed to have elapsed. Mr. Cloud has made no offer as to the payment of such balance, and until such balance is paid, the defendant should not be enjoined from enforcing their execution. If, however, the payment of such balance is made, then the enforcement of any execution against Mr. Cloud should be enjoined.

If Mr. Cloud should not comply with the conditions of the decree to be entered, in accordance with this opinion, all questions as to irregularities in the levy and the writs issued upon such judgment, can and should properly come before the Court of Common Pleas of Guernsey County, to which returns upon all such writs must be made for confirmation.

1912.]

Cincinnati v. Railway.

**STREET RAILWAY FARES WITHIN THE CORPORATE  
LIMITS OF CINCINNATI.**

Decided, August 9, 1912.

THE CITY OF CINCINNATI V. THE CINCINNATI, GEORGETOWN &  
PORTSMOUTH RAILROAD COMPANY; AND THE CITY OF  
CINCINNATI V. THE INTERURBAN RAILWAY &  
TERMINAL COMPANY.

Friday, August 9, 1912.

*Street Railways—As to the Right to Collect Double Fares for a Single  
Continuous Journey in the Same General Direction within the Cor-  
porate Limits of Cincinnati—Injunction—Sections 9120 et seq.*

The court is of the opinion that a double street railway fare—one on the track of an interurban road, and a second fare on the track of the Cincinnati Street Railway Company—can not be legally collected for a single continuous journey in the same general direction within the corporate limits of the city of Cincinnati; but inasmuch as it is a matter that is in some doubt, the court declines to grant an injunction against the collection of such double fares, but leaves the status as it is until the law can be fully determined.

*Alfred Bettman*, City Solicitor, for plaintiff.

*Frank F. Dinsmore*, contra.

SWING, J.

I am asked in the above two cases to enjoin the defendant companies named—interurban electric railway companies operated in Cincinnati—from collecting two fares of five cents each within the city limits. I have heard the testimony and have studied the law with great care aided by the able briefs of counsel. I find the main question in the cases, viz.: the power of the companies under the statutes of the state and ordinances of the city to charge more than one fare, a fare of five cents, within the city limits, most difficult.

The sections of the statutes applicable to the case are in the General Code, Sections 9120 and 9133. It is claimed by the

plaintiff that these cases come under one or the other of these sections.

The Supreme Court, in the case of *Railway Company v. Cincinnati*, 75 O. S., 196, referring to these statutes by their former numbers, say:

“The occasion for both of these acts is not apparent, but they do not necessarily conflict. It may be that the one or the other applies accordingly as recourse has been had to its authority.”

I am of the opinion that this statement is applicable in the present cases as to both defendant companies.

The case in 75 O. S., 196, involved a question as to transfers, and that was the question decided. It is a different question from that involved in these cases. But the court say further:

“However, if the later act applies” (Section 9133) “there is nothing in it requiring transfers. The provision is that the fare charged for transporting passengers in the municipality shall not be greater than that fixed in the franchise of the street railway company.

“*This is a limitation upon the fare the interurban company may charge* for the service it is authorized to render and not a requirement that it shall provide or pay for additional transportation.”

Section 9120, General Code, is as follows:

“Such companies may lease, purchase or make traffic arrangements with any other street railway company as to so much of its tracks and other property as is necessary or desirable to enable them to enter or pass through a city or village, upon the terms and conditions applicable to other street railways.

“Any existing street railway company, owning or operating a road shall receive the cars, freight, packages or passengers of any other road *upon the same terms and conditions* as they carry for the general public.”

Section 9133, General Code, is as follows:

“The fare charged by such railway company for transporting passengers within such municipal corporation or corporations shall not be greater than that fixed in the franchise or franchises held or owned by such street railway company or companies.”

1912.]

Cincinnati v. Railway.

The passenger fare fixed for the Cincinnati Street Railway Company is five cents. It is over the tracks of that company that the cars of the defendant companies pass.

But the defendant companies constructed their own tracks outside the city limits and up to the limits where they connected with the tracks of the street railway companies and were entitled to charge a separate fare on their own tracks so constructed. Subsequently the corporate limits of the city were extended so as to include a portion of their tracks, so constructed, and the question is whether they can continue to charge a separate fare on their own tracks, so constructed, within the city limits, making two fares collected by them within the city limits, one on their tracks, and one on the tracks of the Cincinnati Street Railway Company—the latter now operated by the Cincinnati Traction Company. This question is not decided by our Supreme Court in 75 O. S., 196.

Speaking of the words “the same terms and conditions,” the court say:

“The words ‘terms and conditions’ appear in many, if not all, of the statutes delegating to municipalities the authority to grant to street railroads the right to use the streets, and perhaps in all ordinances making the grant, *and yet it can not be said that they are used with a definite legal signification.*”

Then the court cite several acts and ordinances in which the words are used, and say on page 214:

“It is not necessary in the present case to determine what the words ‘the same terms and conditions applicable to other street railroads’ do mean, and etc., *and in view of the state of the art and the importance of these questions to the public and to the street railroad companies, it is inexpedient to do so.*”

But our Supreme Court in 75 O. S., 196, say, page 209, that the words “terms and conditions” in the statutes do not refer to “the terms and conditions” provided in a particular franchise of any particular street railway company, but rather to the *general terms and conditions* applicable to street railroads in the city generally.



They say "Section 4 of the act of May 17th, 1894" (one of the sections now in the General Code) "provides that the agreement may be made upon the *same terms and conditions applicable* to other street railroads. Not upon the terms and conditions of the grant to the company owning the tracks, but upon the terms and conditions applicable to street railroads generally. So that, while the rate of fare to be charged by a street railway *may be made one of the terms of the grant to it* of the right to occupy the street, *it could not be one of the terms and conditions applicable to street railroads generally.*"

So the rate of fare fixed in the franchise of the Cincinnati Street Railway Company does not govern in this case. This is conceded by counsel for the city in his brief. But it is claimed by counsel for the city that in 1902 when the defendant companies made their arrangements with the Cincinnati Street Railway Company for the use of its tracks in the city, and before the city limits were extended, there was a general ordinance of the city limiting street railroad fares to five cents.

He has introduced in evidence an ordinance passed July 1st, 1859, Section 8 of which is as follows:

"No more than five cents to be charged for fare; and provided that any such company or individual shall not charge more than five cents for each passenger on any of said roads."

Also "a new general ordinance" passed February 7th, 1879, as follows:

"In no event shall the rates of fare be increased beyond the rates specified in existing contract, but shall remain the same except as herein modified."

But these general provisions were omitted from the ordinances as codified in April, 1911, and as counsel for the city says, "To-day there is no term relating to rate of fare in the general street railway ordinance or ordinances of Cincinnati."

But it is claimed by counsel for the city that, these general ordinances having been in effect when defendant companies entered the city, and when they made their arrangements with the Cincinnati Traction Company by virtue of these ordinances and



1912.]

Cincinnati v. Railway.

their traffic agreement and Section 9120, General Code, "They were bound to carry passengers within the city limits for five cents."

Many other contentions are made as to these general ordinances, such as that they did not contemplate interurban roads, unknown when they were enacted, operating cars on their own tracks then outside of the city limits, as in this case, and that they do not apply to existing conditions at this time, and that they were subsequently practically held invalid by our Supreme Court. And numerous other contentions are made.

I have set forth enough to show the extreme difficulty of the case on what I deem the main question. I think it quite impossible for any court but one having final jurisdiction to authoritatively and satisfactorily determine the question. I think this may fairly be said to be indicated by the remarks of our Supreme Court quoted, in 75 O. S., 196.

I will say that I am inclined to think, considering the whole matter, that the contentions of the city are probably correct. But it is said in American & English Encyclopedia of Law, Volume 16, pages 358 and 359:

"An injunction will not usually be granted where the complainant's right is doubtful. When the principles of law on which rights are disputed will admit of doubt, a court of equity although satisfied as to what is the correct conclusion of law upon the facts, will not, without a decision of the courts of law, establishing such principles, grant an injunction. But where the facts upon which the right depends are established or admitted, and the principles of law which on these facts would give the right are settled and established, a court of equity may apply the principles as settled by the court of law to the facts, and allow an injunction."

In these cases it can not be said that the principles of law which would give the right are settled and established until determined finally in the courts. The rule quoted is not confined to temporary injunctions; it applies as well to perpetual injunctions. But an injunction in these cases by this court would really be much in the nature of a temporary injunction, and it could be vacated by appeal or otherwise stayed.

In the case of *Spangler v. City of Cleveland*, 43 O. S., 526, the Supreme Court say, in the opinion, page 526:

“*For a perpetual injunction* the courts require that there shall be no doubt in the case, and that the plaintiff must make out a clear and unexceptionable right. Dan. Ch., 1681.”

Also:

“Courts will not exercise this necessary authority *when the right is doubtful* or the facts not definitely ascertained. *Burnham v. Kempton*, 44 N. H., 92.”

Also:

“The right must be clear. *Bonaparte v. Camden & Amboy Railroad Company*, 1 Bald., 218.”

In view of “the importance of the questions,” as our Supreme Court has said, and the uncertainty as to the law upon the main question, viz.: the question of law as to whether or not the defendant companies are entitled to charge two fares, I think it would be the part of wisdom and indeed my duty under the authorities to leave the status as it is until the law can be finally determined.

For these reasons I will refuse the injunctions and let the cases proceed to the higher courts.

I think I should add that the contentions of defendant companies that they are protected by their original franchises fixing a rate of fare outside the city limits as they then were, and that the granting of the injunction would compel them to operate at a loss within the city, and so be confiscatory, do not seem to me to be good defenses in these cases.

1912.]

Dickman v. Wood.

**CONTRACT WITH AGED WOMAN NOT ENFORCIBLE.**

Common Pleas Court of Hamilton County.

HARRY DICKMAN AND CHARLES H. ORTMAN, PARTNERS DOING  
BUSINESS AS DICKMAN & ORTMAN, v. ISABELLA F. WOOD.

Decided, June 26, 1912.

*Specific Performance—Not Available Against an Aged Woman—Notwithstanding Absence of Fraud or Undue Influence, When—Plaintiff's Remedy an Action for Damages.*

An action for specific performance of a contract for the sale of real estate will not lie against a woman seventy-five years of age, notwithstanding her only objection to carrying out the agreement was one of sentiment in connection with the property, but the plaintiff will be relegated to an action for damages, where it appears that at the time of obtaining the contract the plaintiff knew that she was without the legal advice she was accustomed to have in connection with such transactions, and that only a minimum price was being proposed for the property, and the arrangement as to deferred payments was one which would be open to controversy, and the only damages he has sustained by reason of the breach is the loss of profits from a re-sale of the property, which can be easily ascertained in an action for damages.

*Herrlinger, Dixon & Stewart and W. H. Meyers, for plaintiffs.*  
*Cobb, Howard & Bailey and Wallace Burch, contra.*

HUNT, J.

This is an action to enforce specific performance of a contract to sell real estate. Plaintiffs are builders of good credit and, in connection with such business, buy real estate, remodel or build houses thereon, and then sell for profit. The defendant has been a widow for many years, and is about seventy-six years of age, in ordinary good physical and mental health for her age, although she was under the care of a doctor at the time of the making of the contract in question. For nearly half a century defendant, with her husband during his lifetime, and since has occupied the premises, the subject-matter of this suit, with

other adjoining land used as part thereof. Sons and daughters had arrived at maturity in this home and married and left, except one son and an orphaned granddaughter, who made her home with the defendant, taking care of her according to her necessities.

In July, 1908, the defendant's land having become desirable for building lots, she entered into a contract of lease with L. R. Smith, a real estate agent and builder, by whom the land was subdivided, improved and sold. Such lease included three lots in question in this case upon which the defendant's house is situated. Under such lease defendant was to occupy the home until sold. Before *sale* she entered into an agreement with L. R. Smith by which she was to retain the title to the home and the three lots, exempting them from the lease and giving to L. R. Smith a credit of \$2,500 therefor upon his privilege of purchase of the other lots. In all the dealings of L. R. Smith with Mrs. Wood in the obtaining of his original lease and the sale of the lots included therein and in the different methods used to consummate such sale and secure to defendant her interests therein, no contract or document was signed by Mrs. Wood, until first approved orally or in writing by her brother-in-law, W. F. Boyd, a practicing attorney of this city. The only exception to this custom was the contract by which Mrs. Wood excepted the homestead lots from the lease, but before this transaction was consummated the final documents therefor were also submitted to Mr. Boyd. In many instances Mr. Smith himself took contracts to Mr. Boyd for approval before submitting them to Mrs. Wood for signature. Several months prior to August, 1911, Mr. Boyd died, and thereafter Wallace Burch took his place as Mrs. Wood's legal advisor. All this Mr. Smith knew.

The homestead was not modern and had no sewer or other connections such as houses in the neighborhood had. Mrs. Wood's children were desirous that it also be sold and that Mrs. Wood live elsewhere. The son even put a "For Sale" sign on the house. Mrs. Wood was not, however, desirous of leaving the old house. Her reasons therefor were reasons of sentiment.

In August, 1911, the only person living with Mrs. Wood was a granddaughter, a woman about thirty—the son having taken

1912.]

Dickman v. Wood.

temporary employment at Madison, Indiana. The other children visited her occasionally.

L. R. Smith on August 21, 1911, obtained from the plaintiffs a written proposition to buy defendant's house and the three lots pertaining thereto. He took the written proposition to the defendant; several interviews with her failed to secure her acceptance. He finally secured her verbal acceptance provided her son, then at Madison, Indiana, would consent. L. R. Smith telegraphed to the son urging and advising acceptance, and securing a favorable answer, went to the defendant's house on August 31, 1911, and under persuasion, notwithstanding the granddaughter's advice that the proposition be first submitted to Mrs. Wood's attorney, who was then absent from the city, secured defendant's written acceptance of plaintiffs' proposition to buy for the sum of \$2,450—\$450 cash and \$2,000 with interest on or before one year. In this agreement the vendor agreed to convey by a general warranty deed, but there were no provisions as to security for the deferred payment of \$2,000. Under the contract possession was to be given by October 1, 1911, which was afterwards extended to October 6th.

Immediately after the making of the contract, the prospect of being compelled to leave the old place which had been her home—her husband's home and her children's home for so many years—caused defendant to repent having signed the contract. The granddaughter nevertheless prepared to move and the household furniture was in process of being packed. Mrs. Wood's attorney returned to the city, and after consultation with her, declined to take the balance of the cash payment of \$400, \$50 having been deposited with Mr. Smith by plaintiffs when Mrs. Wood signed the contract. Defendant by her conduct and the conduct of her attorney, clearly manifested to plaintiffs her intention not to comply with the contract. Thereupon plaintiffs brought this suit for specific performance. The sum of \$400 has been deposited in court and plaintiffs offer to pay, if the court so require, the \$2,000 in cash. The defendant's evidence is to the effect that the property is worth from \$3,000 to \$3,500. Plaintiffs' evidence is to the effect that the property is worth \$2,400 or \$2,500.

The property is undoubtedly worth the price which the plaintiffs agreed to pay, although any value in excess of such price is largely speculative. The plaintiffs, nevertheless, manifest a great desire to acquire the property for the agreed price, although both according to the contract itself (being for the benefit of themselves or order), and from the evidence as to their business, they manifestly desire the property only for the pecuniary profit to be made in reselling it.

The written proposition of plaintiffs was left at defendant's house by the real estate agent from August 24th to August 31st, when the defendant was induced to sign it, and it is probable that another son of defendant who visited his mother during such time, was informed of said proposition. The evidence does not establish that the agent made any misrepresentations of any material facts as an inducement for Mrs. Wood to sign, but desiring to earn his commission he shows by his own evidence that he used all his persuasive powers to induce the defendant to sign while he was there and without the accustomed advice of her legal counsel. She signed the contract with the agent at her elbow and the granddaughter objecting for the reason that she realized that Mrs. Wood's attachment for the place would prevail when the agent departed. The evidence is conflicting as to whether the agent urged defendant not to wait for any advice from her attorney before signing, but the agent knew of the custom of the defendant to await the approval of her legal counsel before finally consummating any proposed transaction.

The written contract is in form an offer of the defendant to sell, an acceptance of such offer by the plaintiffs, and an agreement of the defendant to pay the agent's commission, but the fact that the contract was first signed by the plaintiffs and then brought by their agent to the defendant for the purpose of inducing her to sign, changes the apparent relation of the parties. The contract is in form the uniform sale contract adopted by the Cincinnati real estate exchange, and a question has been raised as to whether such contract is a binding contract in form, but for the purposes of this case it will be so considered.

In substance, therefore, this is a case of an aged widow, attached to her home by reason of sentiment because it had been

1912.]

Dickman v. Wood.

her home, the home of her children and deceased husband for more than a quarter of a century—although some of her children desire her to sell—accustomed in all important business transactions to first consult her legal counsel, some of her children desiring her to sell being induced in the absence of such attorney after repeated visits of a persuasive real estate agent with whom she had had dealings and who knew all these facts, to sign a contract to sell such home at a minimum market price to persons represented by such agent and who were buying it only for the profit there was in a re-sale.

The court is well aware that ordinarily contracts for the sale of real estate in the absence of fraud, misrepresentation or undue influence, or substantial inadequacy of consideration, are enforced in equity without regard to the purposes for which such real estate may be desired by the purchasers, because the market value of real estate is ordinarily such that damages for non-performance of a contract to sell are difficult to estimate at law. The court is also aware that while specific performance is discretionary with the court, such discretion is not arbitrary but must be exercised according to established equitable principles.

Nevertheless, while there has been no actual fraud in this case, and no one of the elements of undue influence, inadequacy of consideration or unfairness in term of the contract is, in itself, sufficient to authorize the court to refuse specific performance, yet the agent's knowledge of defendant's custom of obtaining legal advice with regard to such transactions, a custom which should have appealed to such agent as manifestly necessary and proper to be complied with by an old lady for her protection, in connection with the minimum price to be paid, and the possible controversy under the terms of the contract as to the security which could be retained by the vendor for deferred payments, and the further fact that it is affirmatively established in this case that by defendant's non-performance plaintiffs have been damaged only in the loss of profits of a contemplated resale, which profits under the circumstances of this case are not incapable of being fixed in an action at law, all taken together determine the equities of the case in favor of the defendant.

Counsel in their briefs have discussed many questions not herein referred to and have cited many authorities, but an examination of them, in connection with the facts found, show no reason for the application to such facts of any other than well recognized equitable principles.

Specific performance is therefore refused, leaving the plaintiffs to their legal remedy of an action for damages, in the prosecution of which, the findings herein can in no way prejudice them.

### **AN INVALID HIGHWAY CROSSING ACT.**

Common Pleas Court of Hamilton County.

**THE CITY OF CINCINNATI V. THE CINCINNATI, LEBANON & NORTHERN RAILWAY COMPANY AND THE PITTSBURGH, CINCINNATI & ST. LOUIS RAILWAY COMPANY (two cases).**

Decided, August 12, 1912.

*Constitutional Law—Provision for Avoiding Grade Crossings on Highways Invalid for Lack of Provision for Notice to Railway Company.*

Section 8897, P. & A. Anno. G. C., authorizing a municipality in constructing a highway across an existing railroad to build it otherwise than at grade and charge one-half of the cost thereof to the railway company, is unconstitutional for the reason that no provision is made therein for notice to the company of such intention, with opportunity to be heard as in other assessment cases.

*City Solicitor, for plaintiff.*

*Robert Ramsey, contra.*

CUSHING, J.

These actions are brought to recover from the defendant companies one-half of the cost of construction of bridges or viaducts over the railroad of the defendants at Burbank and Whittier streets in the city of Cincinnati.



1912.]

Cincinnati v. Railway.

The act of the Legislature authorizing the city to make the improvement and charge the defendants with half the cost of the same was passed April 25, 1904.

Section 3 of the act (97 Ohio Laws, 546), is:

“Every municipality or other authority hereafter constructing a highway across an existing railroad, shall construct the same above or below the grade thereof, unless permitted in the manner hereinafter provided, to construct the same at grade, and cost of said work shall be paid, one-half by said municipality, and one-half by the railroad company owning said railroad.”

The defendants claim that this act of the Legislature is unconstitutional in that it is in conflict with Section 1 of Article XIV of the Constitution of the United States, which reads as follows: .

“No state shall make or enforce any law which shall \* \* \* deprive any person \* \* \* of property, without due process of law.”

In my opinion the act is unconstitutional. It is within the power of the Legislature to provide that streets and highways crossing the tracks of railroad companies shall not be at grade; that both the municipality and the railroad company shall bear the expense of such improvement. But the act does not provide for notice to the railroad company of the city's intention to make the improvement and charge the company with part of the expense.

Under the act in question the city, without notice or hearing, and without an opportunity to be heard, made the improvement and has charged defendants with half the cost of same. If a law authorizing a municipality to thus charge defendants with a few thousands of dollars is valid, there is no limit to the amount that could be demanded of and charged to railroad companies. Under the act in question when the city has established that the improvement was made and has shown its cost, the defendants are obligated to pay half that cost. There can be no defense to such an action; that is, the question of the necessity for the improvement, its reasonableness and all questions as to

the cost of the same are merged in the power given the municipality to make the improvement. This is a taking of property without due process of law.

The defendants are entitled to notice, and an opportunity to be heard, as in case of other assessment for improvements, before they can be charged with any part of the expense of such improvements.

In each case the demurrer will be sustained. *Railroad Co. v. Keith*, 67 O. S., 280; *Turnpike Co. v. Parks*, 50 O. S., 568; *Turnpike Co. v. Gay*, 50 O. S., 459.

---

### INVALIDITY OF THE VAGRANCY ACT.

Common Pleas Court of Hamilton County.

EX PARTE FRANK SMITH; AND EX PARTE EDWARD CAMPBELL.

Decided, July 24, 1912.

*Constitutional Law—Section 13409 Relating to Vagrancy—Loosely Drawn and in Violation of the Bill of Rights.*

Section 13409 of the General Code, defining vagrancy and providing for the fining and imprisonment of vagrants, is indefinite to a degree which renders its enforcement impracticable, and is in violation of the inalienable right to the liberty clause of the Bill of Rights, and both the statute and the Cincinnati ordinance enacted thereunder are unconstitutional.

*James S. Myers*, for Campbell.

*J. J. McCartin*, for Smith.

*Bernard C. Fox*, for respondent.

DICKSON, J. (orally).

The prisoners are confined in the city work house under commitments issued from the Police Court of Cincinnati, Hamilton county, Ohio. The affidavits, foundations of the commitments, are the same except as to dates and names, and are as follows:

1912.]

Ex Parte Smith.

“Eugene Matthews being first duly cautioned and sworn, says that one Edward Campbell, on or about the 10th day of July, 1912, at the city of Cincinnati, Hamilton county, Ohio, being then and there a male person, of the age of twenty-one years, and physically able to perform manual labor, has willfully and unlawfully not made reasonable effort to procure employment, and was then and there upon the day and date aforesaid, found in a state of vagrancy in the city, county and state aforesaid.” Signed and sworn to.

The city claims that the authority for these affidavits is Section 907 of the Ordinances of Cincinnati, Codification year 1911, which states as far as this offense is concerned, this:

“If any vagrant shall be found in the city of Cincinnati, such person shall on conviction thereof in the police court, be fined for each offense in any sum not less than five (\$5) dollars, or more than fifty (\$50) dollars.”

The city by its counsel states that the definition of a vagrant is from the statutes of Ohio.

Section 6994 of the Revised Statutes reads: ‘

“A male person physically able to perform manual labor, who has not made reasonable effort to procure employment, or who has refused to labor at reasonable prices, who is found in a state of vagrancy, or practicing common begging, shall be fined not more than fifty dollars, and be sentenced to hard labor in the jail of the county until the fine, and the costs of prosecution and accruing costs are paid, and for his labor such convict shall receive credit upon such fine and costs at the rate of seventy-five cents per day.”

The New General Code changed this section and has left out the gist of the section and has destroyed it.

Section 13409 provides:

“Whoever, being a male person able to perform manual labor, has not made reasonable effort to procure employment or has refused to labor at reasonable prices, is a vagrant or common beggar, and shall be fined not more than fifty dollars and sentenced to hard labor in jail until the fine and costs are paid. For such labor he shall receive a credit upon said fine and costs at the rate of seventy-five cents per day.”

The vagrant as thus defined is indefinite. In Ohio there is no common law crime or offense. A crime or offense is defined by the General Assembly, or under its authority, as to certain kinds of misdemeanors by the council of a city by ordinance.

One of man's inalienable rights is liberty. Ignorance of the law excuses no one, but certainly the law which punishes, at least should be clear, definite and certain. It is severe enough to require a knowledge of the law to be in every one. A law should be such that it must be understood, not that it might be understood. There should not be any doubt as to whether a man is a beggar or a vagrant, and there should be no doubt as to what is meant by the words, vagrant and beggar. Neither the ordinance nor the statute as to a vagrant is capable of being understood by any one.

It is as unjust to punish one under an indefinite and uncertain law as to do so under an *ex post facto* law. Each is equally bad.

The statute and the ordinance are void as against the Bill of Rights, Article I, Section 1.

1912.]

Drum v. Cleveland.

**VALIDITY OF AN ISSUE OF MUNICIPAL BONDS FOR PURCHASE OF AN ELECTRIC LIGHT PLANT.**

Common Pleas Court of Cuyahoga County.

W. B. DRUM, A TAX-PAYER, ON BEHALF OF THE CITY OF CLEVELAND, V. THE CITY OF CLEVELAND ET AL.

Decided, June 10, 1912.

*Municipal Corporations—Proceedings for an Issue of Bonds in Excess of Two and One-half Per Cent. of the Aggregate Listed Value of Taxable Property—Application of the Crosser Act—Construction of Paragraph 12 of Section 3939.*

1. Paragraph 12 of Section 3939, P. & A. Anno. G. C., approved by the Governor on May 26, 1911, means the same and is reconcilable with the same paragraph as it appears in the act approved by the Governor on May 22, 1911,\* the legislative intent being that municipalities should have the power to purchase or erect electric light plants for the purpose of furnishing light to the municipality and its inhabitants; and it follows that an ordinance providing for the erection of such a plant and the supplying of light therefrom does not contain a dual purpose and is not subject to attack on that account.
2. An election for the purpose of authorizing a municipality to issue bonds in excess of two and one-half per cent. of the aggregate value of the property listed for taxation within the municipality is rendered invalid where less than sixty days elapsed between the passage of the resolution declaring the necessity of the issuance of said bonds and the election approving said issue.
3. The fact that the resolution declaring the necessity for an issue of bonds recited that such necessity existed "in the fiscal year" during which the resolution was adopted, is not rendered invalid by reason of the fact that the proceedings with reference to such bond issue were not completed until after another fiscal year had begun.
4. An ordinance providing for the expenditure of money does not become operative under the Crosser law, Section 4227-1 P. & A. Anno. G. C., until sixty days after its passage; and advertisement for the sale of the bonds from which the funds for such expenditure are to be derived is without authority of law until the sixty days have expired, and the bids can not lawfully be opened and the bonds sold under an advertisement thus prematurely made.

---

\*Both of these acts appear in P. & A. Anno. G. C. as Section 3939.

*Squire, Sanders & Dempsey*, for plaintiff.

*City Solicitor*, contra.

COLLISTER, J.

This is an action brought by the plaintiff, a tax-payer, on behalf of the city of Cleveland, against said city and certain of its officers, to restrain said city and said officers from doing any act in consummation of the sale or issuance of certain bonds named and described in the petition.

It is averred in the petition that the solicitor of said city was by plaintiff requested in writing to bring the action, and refused to bring it.

The petition by proper averments pleads the corporate existence of the city, and the official positions of the other defendants.

The petition avers that on the 18th day of September, 1911, the council of said city adopted a resolution declaring the necessity of issuing bonds of said city in excess of an aggregate of  $2\frac{1}{2}$  per cent. of the total value of all property in the city of Cleveland, listed and assessed for taxation, for the purpose of erecting electric light works, and for supplying light to the corporation and inhabitants thereof, and purchasing the necessary land therefor. A copy of said resolution is attached to the petition, said copy being in words and figures following, to-wit:

“Resolution declaring the necessity of issuing bonds of the city of Cleveland in excess of an aggregate of  $2\frac{1}{2}$  per cent. of the total value of all property in the city of Cleveland, as listed and assessed for taxation for the purpose of erecting light works and for supplying light to the corporation and inhabitants thereof, and for the purchase of necessary land therefor.

“Be it Resolved, by the council of the city of Cleveland, state of Ohio, two-thirds of all members elected and appointed thereto concurring, that it is necessary to issue and sell bonds of the city of Cleveland in the fiscal year beginning January 1, 1911, for the purpose of erecting electric light works, and for supplying light to the corporation and the inhabitants thereof, and for purchasing the necessary land therefor, in an amount in excess of two and one-half per cent. ( $2\frac{1}{2}$  per cent.) of the total value of all property in the city of Cleveland as listed and assessed for taxation, to-wit, in the sum of two million dollars (\$2,000,000); and that the question of issuing and selling said bonds of said

1912.]

Drum v. Cleveland.

city in excess of said two and one-half ( $2\frac{1}{2}$ ) per cent. as aforesaid, that is, in the sum aforesaid, be submitted to a vote of the qualified electors of said city, at the next regular election, occurring after the passage of this resolution, to-wit, on November 7, 1911, at the regular place or places of voting in said city, as established by the board of deputy state supervisors and inspectors of elections of Cuyahoga county, Ohio, between the hours of 5:30 A. M. and 5:30 P. M.; that said election shall be conducted and certified in the manner provided by law; that the question whether such bonds shall be issued shall be put in the form following, to-wit: 'Shall the bonds of the city of Cleveland be issued in the sum of \$2,000,000 for the purpose of erecting electric light works, and for supplying light to the corporation and the inhabitants thereof, and for purchasing the necessary land therefor'; and those who vote in favor of the proposition shall have written or printed on their ballots the words: 'For the issue of bonds'; and those who vote against the same shall have written or printed on their ballots the words: 'Against the issue of bonds'; that the mayor be and he is hereby directed to give public notice of the time and place of holding said election in the manner provided by law, and that the clerk be and he is hereby directed to certify a copy of this resolution to the board of deputy state supervisors and inspectors of elections of Cuyahoga county, Ohio.

"R. Y. McCray, *City Clerk*."

The petition avers that said resolution was, on September 19, 1911, approved by the acting mayor of the city; and on said 19th day of September, 1911, the said resolution was certified to the board of deputy state supervisors and inspectors of elections of Cuyahoga county. That on the 6th, 13th, 20th and 27th days of October, 1911, the then mayor of said city caused to be published a notice of election on the question as to whether or not said bonds should be issued. A copy of said notice is attached to the petition, and is in words and figures following:

"NOTICE OF ELECTION. Notice is hereby given that in pursuance of a resolution of the council of the city of Cleveland, passed September 18, 1911, there will be submitted to the qualified electors of said city at the general election in the city of Cleveland on the 7th day of November, 1911, between the hours of 5:30 o'clock A. M. and 5:30 o'clock P. M., standard time, the question of issuing bonds of said city in the fiscal years begin-

ning January 1, 1911, in an amount in excess of an aggregate of two and one-half per cent. ( $2\frac{1}{2}$  per cent.) of the total value of all property in the city of Cleveland, as listed and assessed for taxation; that is to say, in the sum of two million dollars (\$2,000,000), for the purpose of erecting electric light works and for supplying light to the corporation and inhabitants thereof and for the purchase of the necessary land therefor. Those who vote in favor of the proposition of issuing bonds as aforesaid shall have written or printed on their ballots 'For the issue of bonds,' and those who vote against the same shall have written or printed on their ballots 'Against the issue of bonds.'

"October 6, 1911.

HERMAN C. BAEHR, *Mayor*."

The petition avers that there was submitted to the voters of the city of Cleveland, at the regular election held on the 7th day of November, 1911, a ballot on which was written the following:

"Shall the bonds of the city of Cleveland be issued in the sum of two million dollars, for the purpose of erecting electric light works and for supplying light to the corporation and the inhabitants thereof, and for purchasing the necessary land therefor?

"For the issue of the bonds.

"Against the issue of the bonds."

That at said election more than two-thirds of those voting on said question voted in favor of the issue of said bonds.

The petition further avers, that on the 19th day of February, 1912, the city council of said city passed an ordinance, No. 23930, being "An ordinance to issue bonds in the sum of one million dollars (\$1,000,000), for the purpose of erecting electric light works and for supplying light to the corporation and the inhabitants thereof, and for the purchase of the necessary land therefor."

A copy of said ordinance is attached to the petition, and is in words and figures following, to-wit:

"ORDINANCE No. 23930.

"An Ordinance to issue bonds in the sum of one million dollars for the purpose of erecting electric light works and for supplying light to the corporation and inhabitants thereof, and for the purchase of necessary land therefor.

"WHEREAS, at the general election held in the city of Cleveland, state of Ohio, on the 7th day of November, 1911, the ques-



1912.]

Drum v. Cleveland.

tion of issuing bonds of the said city of Cleveland, Ohio, in the sum of two million dollars (\$2,000,000) for the purpose of erecting electric light works and for supplying light to the corporation and inhabitants thereof, and for the purchase of necessary land therefor, the same being an amount in excess of two and one-half ( $2\frac{1}{2}$ ) per cent. of the total value of all property of the city of Cleveland as listed and assessed for taxation, was submitted to the qualified voters of said city; and

“WHEREAS, two-thirds of the voters voting at such election upon the question of issuing such bonds in favor thereof; now, therefore,

“*Be it Ordained*, by the council of the city of Cleveland, state of Ohio, two-thirds of all members elected thereto concurring, that

“Section 1. It is deemed necessary to issue and sell bonds as herein provided.

“Sec. 2. That under authority of law bonds of the city of Cleveland be issued to the amount of one million dollars (\$1,000,000) for the purpose of erecting electric light works and for supplying light to the corporation and inhabitants thereof, and for the purchase of necessary land therefor.

“Sec. 3. That said bonds shall be designated as ‘electric light bonds’; shall be of the denomination of one thousand dollars (\$1,000) each; shall be dated April 1, 1912; shall be drawn to mature April 1, 1947, and shall bear interest from the 1st day of April, 1912, at the rate of four (4) per cent. per annum, payable semi-annually upon the presentation and surrender of the attached coupons, signed by the city treasurer.

“Sec. 4. Said bonds shall be signed by the mayor and city auditor, prepared by the city solicitor, sealed with the city’s seal, and recorded in the office of the sinking fund trustees. Said bonds shall express upon their face the purpose for which they are issued, the fact that they are issued pursuant to law and ordinance, and they shall be made payable, both principal and interest, at the American Exchange National Bank, in the city of New York.

“Sec. 5. That the faith and credit of the city of Cleveland are hereby pledged for the payment of both principal and interest of the bonds hereinbefore described at maturity.

“Sec. 6. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

“Passed February 19, 1912.

“R. E. COLLINS, *City Clerk*.

“CHARLES W. LAPP,

“*President of the Council*.

“Approved by the mayor February 21, 1912.”

That said ordinance was approved by the mayor on February 21, 1912.

The petition avers that the defendants, assuming to act under the pretended authority conferred by said resolution of September 18, 1911, and the vote of the electors on November 7, 1911, and the ordinance of February 19, 1911, have advertised that bids would be received at the auditor's office until 12 o'clock noon on April 8, 1912, for the purchase of \$1,000,000 four per cent. city of Cleveland electric light coupon bonds, maturing April 1, 1947, and drawing interest from April 1, 1912.

Plaintiff further says in his petition:

"That the proposed issue and sale of said bonds under the pretended authority of said resolution of September 18th, 1911, and the proceedings had pursuant thereto, and said ordinance of February 19th, 1912, are illegal, unauthorized, and constitute an abuse of corporate power by said city, in the following respects, to-wit:

"(a) For the reason that the council of the city of Cleveland was without power to adopt the resolution of September 18th, 1911, and submit to the electors the question of issuing bonds for the dual purpose of erecting an electric light works and for supplying light to the corporation and the inhabitants thereof.

"(b) That the election held November 7th, 1911, was void, for the reason that sixty days had not intervened between the passage of said resolution on September 18th, 1911, and the date of said election.

"(c) That the said ordinance passed on the 19th day of February, 1912, and the said act of the defendants in thus advertising for bids for said bonds, are void, for the reason that said resolution of September 18th, 1911, provides only for the issuance and sale of bonds during the fiscal year beginning January 1, 1911.

"(d) That the said ordinance No. 23930 will in no event become operative until sixty days after its passage, to-wit, the 18th day of April, 1912."

Plaintiff further says that the defendants will, unless enjoined by the order of this court, proceed to accept bids for said bonds and award the same to the highest bidder, and will execute and deliver to said highest bidder the bonds of the city of Cleveland

1912.]

Drum v. Cleveland.

to the extent of one million dollars; all of which acts plaintiff avers are unlawful and without any valid authority in the city of Cleveland whatsoever.

Wherefore, plaintiff prays that a temporary order may issue, to be in effect during the pendency of this action, enjoining the defendants and each of them, and their agents, attorneys, servants and employes, from either directly or indirectly doing any act in consummation of the sale or issuance of said bonds or any part of them; and that on final hearing said injunction may be made permanent; and for all other and further relief to which the plaintiff in equity and good conscience may be entitled.

To that petition the defendants file a demurrer, in the following language:

“Now come the defendants in the above entitled action and demur to the petition of the plaintiff filed herein, upon the ground and for the reasons that said petition does not contain facts sufficient to constitute a cause of action or to entitle the plaintiff to the relief prayed for.”

The defendants claim, by the filing of the demurrer that, admitting all the averments of fact contained in the petition to be true, yet under the law the plaintiff is not entitled to the relief prayed for.

As above recited, the plaintiff claims the proposed sale and issue of said bonds are illegal and unauthorized, and constitute an abuse of corporate power in four respects, designated in the petition *a*, *b*, *c* and *d*. Let us take these questions up in order.

(*a*) It is the claim of the plaintiff that in the language of the ordinance of September 18, 1911, “for the purpose of erecting electric light works and for supplying light to the corporation and the inhabitants thereof,” and in the same language on the ballot submitted to the voters on November 7, 1911, is found a *dual* or *two* purposes, to-wit, (1) the issuing of bonds “for the purpose of erecting electric light works,” and (2) the issuing of bonds “for the purpose of supplying light to the corporation and the inhabitants thereof”; that is, the proceeds from the sale of the bonds could be used to *erect* electric light works, and for *maintaining* or *operating* electric light works when erected; and

that the amount that would be used for each is not separated in the resolution of September 18, 1911, nor on the ballot aforesaid; and that a voter, if he was in favor of one and against the other, could not vote for the one he favored without also voting for the one he was not in favor of.

If there were two "purposes" on said ballot and in said resolution of September 18, 1911, then the contention of the plaintiff must prevail, for the Supreme Court of the state has decided that question in favor of the contention of the plaintiff. See *The Elyria Gas & Water Company v. City of Elyria*, 57 O. S., 374, paragraphs 1, 2 and 4 of the syllabus reading as follows:

1. "The proceedings of the council of a municipal corporation must, in order to be valid, be within the power conferred on it, and in substantial conformity with the statutes regulating them."

2. "The proper adoption, by the council, of the resolution declaring it to be necessary to issue and sell the bonds of the corporation for a specific purpose authorized by Section 2835 of the Revised Statutes, and providing therein for the submission of the question of their issue to the electors at an election to be held for that purpose, is essential to the validity of all subsequent proceedings, and without which there can be no lawful issue or sale of the bonds."

4. "The purchase of water works, and the erection of new ones, are distinct measures, requiring different proceedings; and a resolution of council which combines both as one, and provides for the submission, in that form, of the question of the issue and sale of the bonds of the municipality for both purposes combined, is unauthorized, and ineffectual for either purpose; nor can it be made effectual for either by the elimination of the other in the proceedings subsequent to the resolution. It is the policy of the statute that each measure for which it is proposed to issue and sell the bonds of the corporation shall stand on its own merits, unaided by combination with others, and that it be voted upon as an independent measure, by the council and electors, uninfluenced by such combination."

See also opinion in that case on pages 380 and 381.

The following sections of the General Code have application to this branch of the case now under discussion:

Section 3912 of the General Code reads as follows:

1912.]

Drum v. Cleveland.

“Municipal corporations shall have special power to borrow money and to maintain and protect a sinking fund. The power to borrow money shall be exercised in the manner provided in this chapter.”

Section 3918 of the General Code reads as follows:

“Bonds issued under authority of this chapter shall express upon their face the purpose for which they were issued, and under what ordinance.”

In Section 2835 of the Revised Statutes of Ohio, as amended April 21, 1893 (90 O. L., 229), appears for the first time any reference to authority given a municipality to issue bonds on the subject under discussion. That section, as then amended, so far as it applies to this bond issue for the purpose under discussion, reads as follows:

“2835. The trustees of any township or hamlet or the council of any municipal corporation may issue and sell their bonds, in amount and denominations such as they may deem necessary for the special purpose in view, whenever it is desired by the voters of such township or municipal corporation to make any of the following improvements or to provide for any of the following public purposes:

“1. For procuring the real estate and right of way for any improvement authorized by this section.

“16. For erecting or purchasing gas works *and* electric light works, and for supplying light to the township or corporation and the inhabitants thereof.”

Said section was again amended April 29, 1902 (95 O. L., page 318); and said section was again amended April 23, 1904 (97 O. L., page 291); and was again amended March 22, 1906 (98 O. L., page 63); and was again amended March 3, 1909 (100 O. L., page 53).

On February 15, 1910, the General Code went into effect, and said Section 2835, amended as aforesaid, found its number therein as Section 3939.

In the act of April 21, 1893, the subdivision of the section under discussion was No. 16. In each subsequent amendment and in said Section 3939 the number of said subdivision is 12. The only difference in the wording of said subdivision 16 from the

## CUYAHOGA COUNTY COMMON PLEAS.

Drum v. Cleveland.

[Vol. 13 (N.S.)]

wording of said subdivision 12, in the various amendments and in the General Code aforesaid, is that in said subdivision 16 the word "and" is used between the words "gas works" and the words "electric light works"; and in said subdivision 12 in each of said amendments and in said section of the General Code the word "or" is used between the words aforesaid.

On May 15, 1911, said Section 3939 was amended, and in such amendment said subdivision 12 remained unchanged, and reads as follows:

"12. For erecting or purchasing gas works or electric light works, and for supplying light to the corporation and the inhabitants thereof."

This act was approved by the Governor on May 22, 1911.

On the same day, to-wit, May 15, 1911, the said Section 3939 was also amended, and in such amendment said subdivision 12 reads as follows:

"12. For erecting or purchasing gas works or works for the generation and transmission of electricity for the supplying of gas or electricity to the corporation and the inhabitants thereof."

This act was approved by the Governor May 26, 1911.

Is effect to be given to Section 12 of the act of May 15, 1911, approved by the Governor on May 22, 1911, or to said section of the act of May 15, 1911, approved by the Governor May 26, 1911. If the two are irreconcilable, then effect is to be given to the later act, to-wit, the act approved by the Governor May 26, 1911.

See *State, ex rel, v. Halladay*, 63 O. S., 165, the syllabus of which is as follows:

"1. In so far as the two statutes are irreconcilable, effect must be given to the one which is the later. A bill can not become a law until it has been signed by the presiding officer of each house; and when one bill was so signed after another bill was signed on the same day, the former is the later enactment."

It follows that if the two acts are reconcilable, then effect may be given to either, as in such case they would mean the same thing.

1912.]

Drum v. Cleveland.

Are these two acts irreconcilable?

Said Section 12 of the act approved May 22, 1911, reads as follows:

“For erecting or purchasing gas works or electric light works, and for supplying light to the corporation and the inhabitants thereof.”

Said Section 12 of the act approved May 26, 1911, reads as follows:

“For erecting or purchasing gas works or works for the generation and transmission of electricity, for the supplying of gas or electricity to the corporation and the inhabitants thereof.”

In construing an enactment of the Legislature, the courts must, if they can consistently with the language used and the object to be accomplished, so construe such legislation as to carry out the legislative intent.

It seems to the court that said subdivision 12, as found in both the acts, means one and the same thing; that is, that bonds may be issued so that a plant can be erected for the purpose of supplying light to the corporation and its inhabitants. To give it the other construction would be to say that the city could issue bonds “for supplying light to the corporation and its inhabitants” without its becoming the owner of a plant by either purchase or erection; and that the city could issue bonds to “erect or purchase an electric light plant” for no other purpose whatever except the one “to erect or purchase it,” and without any purpose to use it to supply light to the corporation and inhabitants thereof. The Legislature must have meant that the power to issue bonds to purchase or erect an electric light plant included, as part of such erection or purchase, the *purpose* to use said plant for furnishing light to the corporation and the inhabitants thereof.

This view of the acts means that they both mean the same thing; and the resolution of September 18, 1911, did not contain a *dual* or *two* purposes, nor did the ballot submitted to the voters on November 7, 1911.

So far as this feature of the case is concerned, the demurrer is sustained.



(b.) It is claimed by the plaintiff that the election held November 7, 1911, was void, for the reason that sixty days had not intervened between the passage of the resolution of September 18, 1911, and the election of November 7, 1911. In other words, plaintiff claims the provisions of the act of May 31, 1911 (102 O. L., 521, commonly called the Crosser act); apply to such a resolution as that of September 18, 1911.

The court then read said act, which appears in P. & A. Anno. General Code, as Section 42227-1.

The sections of the General Code, as found in Page & Adams Annotated General Code, bearing upon this branch of the case, are Section 3939, Section 1, subdivision 12; Section 3943, Section 3944, Section 3945, Section 3946 and Section 3947. These sections are as follows:

“Section 3939. Section 1. When it deems it necessary, the council of a municipal corporation, by an affirmative vote of not less than two-thirds of the members elected or appointed thereto, by ordinance, may issue and sell bonds in such amounts and denominations, for such period of time, and at such rate of interest, not exceeding six per cent. per annum, as said council may determine, and in the manner provided by law, for any of the following specific purposes:

“12. For erecting or purchasing gas works or works for the generation and transmission of electricity, for the supplying of gas or electricity to the corporation and the inhabitants thereof.”

“Section 3943. The council, by resolution passed by an affirmative vote of not less than two-thirds of all the members elected or appointed thereto, shall declare it necessary to issue and sell bonds of the corporation. Such resolution shall state the purpose and amount of said issue, and shall fix a date upon which the question of issuing and selling such bonds shall be submitted to the electors of the corporation. Council shall then cause a copy of such resolution to be certified to the deputy state supervisors of the county in which the corporation is situated.

“Section 3944. The deputy state supervisors shall prepare the ballot and make the necessary arrangements for the submission of such question to the electors of such municipal corporation at the time fixed in the resolution.

“Section 3945. The election shall be held at the regular place or places of voting in the municipality, and be conducted, canvassed and certified in like manner, except as otherwise provided



1912.]

Drum v. Cleveland.

by law as regular elections in the municipal corporation for the election of officers thereof.

“Section 3946. Thirty days’ notice of the election shall be given in one or more newspapers printed in the municipality once a week for four consecutive weeks prior thereto, stating the amount of bonds to be issued, and the purpose for which they are to be issued, and the time and place of holding the election. If no newspaper is printed therein, the notice shall be posted in a conspicuous place and published once a week for four consecutive weeks in a newspaper of general circulation in the township or municipal corporation.

“Section 3947. If two-thirds of the voters voting at such election upon the question of issuing the bonds vote in favor thereof, the bonds shall be issued. Those who vote in favor of the proposition shall have written or printed on their ballots, ‘For the issue of bonds’; and those who vote against it shall have written or printed on their ballots, ‘Against the issue of bonds.’ ”

These last quoted sections provide that when the council deems it necessary, it may, by a two-thirds vote, issue bonds for the purpose named in said subdivision 12 of Section 3939.

Section 3943 provides the initial step for issuing bonds, that is, the council shall, by an affirmative vote of not less than two-thirds of all the members elected or appointed thereto, declare the necessity for issuing bonds; and the resolution therefor shall state the purpose and amount of said issue, fix at date upon which the question of issuing and selling such bonds shall be submitted to the electors, and shall cause a copy of the resolution to be certified to the election officials.

Sections 3944, 3945 and 3946 provide for the procedure in the holding of an election on the question of the issuing of said bonds.

Section 3947 provides for the form of the ballot; and, further, that if two-thirds of those voting are in favor thereof, the bonds shall issue.

These sections seem to furnish a complete statutory scheme for obtaining the views of the voters on the question of issuing bonds. It is the opinion of the court that the referendum was enacted so that the people might have a check on municipal legislation if they care to use it; and it was not the purpose that

they should have a check on their own vote when once given.

Again, if the referendum law applied to such legislation as this, then during the sixty day period a *majority* of the voters could, by means of the referendum vote, authorize the issuing of bonds when it is clearly the policy of the law that bonds to be issued for the purposes we are discussing, and in excess of 2½ per cent. of the total indebtedness, must have the approval of *two-thirds* of the voters.

The two laws are too inconsistent for us to infer that the Legislature intended they should both apply to the same subject. Keeping each within its proper sphere, each can stand and serve its purpose.

So far as this feature of the case is concerned, the demurrer is sustained.

(c.) It is claimed that the ordinance of February 19, 1912, and the advertising for bids, are void, for the reason that said resolution of September 18, 1911, provides only for the issuance and sale of bonds during the fiscal year beginning January 1, 1911.

It is true the resolution of September 18, 1911, contains the words, "Be it resolved, by the council of the city of Cleveland, two-thirds of the members elected and appointed thereto concurring, that it is necessary to issue and sell bonds of the city of Cleveland in the fiscal year beginning January 1, 1911," yet I find nothing in the statutes requiring or authorizing such a limitation. On the argument of the demurrer, the court was not referred to any statute requiring or authorizing such a provision in the resolution, or to any decision of any court illustrative of such a provision in a resolution and the effect thereof. The main purposes of the resolution were, it seems to me, the declaration of the necessity to issue bonds, the purpose for which they were to be issued, the amount thereof, and the providing for a vote of the people on the question.

The recitation of a "fiscal year," in which the resolution declared the necessity existed for the issuing of the bonds, was not of the essence of the resolution. I have not had the time or opportunity to examine the books for any authority on the subject,

1912.]

Drum v. Cleveland.

and, as before stated, the court was not referred to any by counsel. In the absence of such citation, it is fair to assume, at least for the purposes of this demurrer, that none exist in favor of plaintiff's contention, and that plaintiff does not place much faith in his contention in this regard.

So far as this feature of the case is concerned, the demurrer is sustained.

(d.) Plaintiff claims that the said ordinance No. 23930 will in no event become operative until sixty days after its passage, to-wit, the 18th day of April, 1912; and that the advertisement for the sale of said bonds had in the meantime was without authority of law, and that bids could not lawfully be opened for said bonds on April 8, 1912, the date provided therefor in said advertisement.

This raises the question whether or not the act of May 31, 1911 (102 O. L., 521), applies. That act is the one commonly called the Crosser act, and so much of it as is applicable to the case at bar has been referred to hereinbefore. The wording of the act is not as clear as could be desired, yet if the evident intention of the Legislature can be gathered from it, the court should give it effect, and leave its correction, if any be needed, to the Legislature.

In Ohio, by constitution, there are three co-ordinate branches of the government—the executive, legislative and judicial; and each performs a governmental function separate and different from and independent of the others. One should not usurp or attempt the functions of the other. The Legislature, acting within its proper constitutional limits, and presumably for the best interests of the people of the state, enacted the so-called Crosser act, thereby intending to render inoperative for the period of sixty days after its passage the kind of resolutions, ordinances and measures named in the act, enacted by the council of a municipal corporation. The language of the act is, "No resolution, ordinance or measure of any municipal corporation creating a right, involving *the expenditure of money*, shall become effective in less than sixty days after its passage." The court can not, if it keeps within its proper governmental func-

tion. (the judicial) legislate. It must, when an act of the Legislature is before it, in a legal proceeding, take the act as it finds it, and give it the effect, if possible, intended by the Legislature. This ordinance being an ordinance providing for the issuing of the bonds of the city, and pledging the faith and credit of the city for the payment of both the principal and interest of said bonds, is clearly within the spirit and letter of said act of May 31, 1911, and more particularly that part embraced in the words "involving the expenditure of money." By the plain provisions of the act, "no ordinance involving the expenditure of money shall become effective in less than sixty days after its passage." This ordinance, being an ordinance that involves the expenditure of money, could not, because of the existence of said act of May 31, 1911, become effective in less than sixty days after the passage of said ordinance. The language of the act is: "\* \* \* no ordinance \* \* \* creating a right, involving the expenditure of money \* \* \* shall become effective in less than sixty days after its passage." If it can not become effective in less than sixty days, then until the expiration of said sixty days it is as if never enacted, and must lie dormant and without force, so that the people, if they deem it wise so to do, may bring into play during that period the referendum features of said act of May 31, 1911. It being, during that period, of no effect, it follows, as night the day, that no steps can be taken during that time in furtherance of the issuing of sale of said bonds. Therefore the act of the defendants in advertising said bonds for sale within said sixty-day period, and offering them for sale on April 8, 1912, said date being a date within said sixty-day period, was premature, contrary to the Crosser act, without warrant of law, and *ultra vires* of the city.

It follows that, so far as this feature of the case is concerned, the demurrer must be overruled.

This leaves the city in a situation that it may now pass an ordinance similar to ordinance No. 23930, and at the expiration of said referendum period advertise and sell said bonds.

1912.]

Journeyman v. Master Horseshoers.

**UNREASONABLE RULE OF AN ASSOCIATION OF  
EMPLOYERS.**

Common Pleas Court of Hamilton County.

THE JOURNEYMEN'S HORSESHOERS LOCAL UNION NO. 12, ET AL V.  
THE MASTER HORSESHOERS' PROTECTIVE ASSOCIATION OF  
CINCINNATI, ET AL.\*

Decided, June 6, 1912.

*Employer and Employee—Injunction Lies Against Enforcement of an  
Order for a Lockout, When—Rights of Both Parties.*

Injunction lies against enforcement of an order for a lockout, where under the rules of the organization of employers making the order its members are liable to fine or expulsion for disobedience thereof.

*John Weld Peck, for plaintiffs.*

*Province Pogue and M. F. Galvin, contra.*

DICKSON, J.

The plaintiff, a union, and individual members thereof, complain that the defendants, an association, and individuals and partners, members thereof, have entered into an agreement to discharge all their employes when ordered so to do, and that this agreement gives a right to punish any member who refuses to obey such an order; that the defendant association is unlawfully engaged in restraint of trade in that no member thereof is permitted to shoe a horse which has been customarily shod in an-

---

\* In the Circuit Court the following memorandum opinion was filed July 20:

"By the Court.

"From the evidence in the above case and the law applicable thereto the court is of the opinion that the plaintiffs are entitled to the relief prayed for in their petition.

"A decree may therefore be taken similar to that entered in the Court of Common Pleas, excepting as to that portion thereof relative to the infliction of any penalty of fine or expulsion upon any member of the defendant association, the rule involving the same having been rescinded."

other shop; that the defendant association has unlawfully ordered a lockout, ordering all its members to discharge all of its journeymen employes; that this order of this lockout is distasteful to many of its members who have obeyed the order because compelled so to do by the rules of the association. The plaintiffs ask an injunction against the defendants, and that the defendant association be ordered to permit each of its members "to pursue his own will and desire in connection with the employment and retention of his employes"; ask also for a dissolution of the association.

All parties hereto are engaged in the horseshoeing business.

We have before this court, a tribunal created by the law for justice, the employer and the employe. Each side asks this court to settle in certain respects the rights of labor and capital—that is, property rights.

There can exist no right without a duty. The employed and the employe each has its combination, or union, or association, organized for certain advantages—here, property rights. The employer's property right is capital. The employe's property right is labor. Capital exists only through labor. Labor exists only through capital. The one can not exist without the other, and neither without a governing power—the government, the law.

Labor or capital, each in its property right, owes to the other a duty, and this duty must be enforced by the law. The supreme duty is to use each to the other ordinary care, reasonable care, each to do to the other as it would be done by, each to so act as not to intentionally injure the other.

Each organization, or association, or union here has been advancing itself and its members to the best possible point of advantage, to get as much as it can for its side. This is eminently right. But each has forgotten the rights of the other; each has forgotten the rule, live and let live. One or the other perhaps has gone too far, and hence the relations between plaintiffs and defendants are strained, and properly both are here to seek redress in a court by its rules of correct living, found to be best by long experience.

1912.]

Journeyman v. Master Horseshoers.

There being no disagreement as to wages or hours, etc., the employer claims the right to use certain machine made shoes. The employe claims the right to refuse to handle these shoes. Each claims that the use or non-use of these shoes vitally affects his property right.

The employer has a right to hire or refuse to hire and to use that material which best suits him.

The employe has a right to be hired or refuse to be hired and to use the material furnished him, or to refuse to be hired because the materials used do not suit him.

Thus it is seen that the rights of each are the same. In law, each may use these rights peaceably even if it destroy the property rights of the other, but no force or violence or unlawful means will be permitted by either. If the rights of an individual alone were involved, probably the rule of the survival of the fittest would obtain, and this case would not be here.

Here we are concerned with the rights of organized capital and organized labor.

The law encourages both to organize. In union there is strength—power. With power the tendency of the majority is to crush the minority, the powerful to crush the weak. It is the duty of the law, the government, to protect the minority and the weak. Organized capital and organized labor with their rights must not forget their duties; each must have a due regard to the rights of the other, and this regard we call duty.

Each in organization for its self-preservation must necessarily have the right to impose restrictions upon its members, but this right must be used reasonably and with a due regard to the rights of others, and it must never be forgotten that to exist each must live and let live.

Capital and labor in this case, each claims to have exercised its legal rights.

The fact that capital and labor are both idle, both suffering, shows that something is wrong; therefore, same duty has been neglected.

The evidence clearly shows that the direct or proximate cause of the present trouble is the desire of the Masters Association to

use machine made shoes. To this end this association sent a communication to the Journeymen's Union stating that certain machine made shoes would be used and fixing a day for an answer. Before answer day, one of the members of the Journeymen's Union left his forge. Immediately thereafter the Masters Association, through its officers, ordered a lockout in all the shops belonging to the association. All the shops in the city except three obeyed the order and are idle. Several of the shops did not desire a lockout, but obeyed orders. Some of the shops which have shut down, desire to reopen and are satisfied not to use machine made shoes.

The only real question at issue is, did the Masters Association do its duty under the law when under the conditions existing it ordered a lockout? Among the rules of the Masters Association binding upon all its members is one which prescribes certain penalties for a disobedience of an order of the association, among which is expulsion from membership and a money fine. This right of membership is valuable. This threat to expel is unreasonable, is coercion and intimidation, and therefore unlawful. The plaintiffs herein have a direct interest in this illegal lockout. It directly and injuriously affects their property rights, that is right to use, to sell their labor at its best advantage.

All rules, regulations, constitutions and by-laws of corporations, unions, associations, etc., must be reasonable and lawful, or a court of equity will enjoin their enforcement and will in a proper case and between proper parties, dissolve the concern violating the law.

The enforcement of the order for a lockout is not binding upon the members of the Masters Association, and its enforcement against the members will be enjoined.

A dissolution of the defendant association, corporation, will not be ordered.



1912.]

Thomas v. Weber.

**VERBAL AGREEMENT AS TO LOCATION OF A DIVIDING  
LINE INVALID.**

Common Pleas Court of Ashland County.

THOMAS V. WEBBER.

Decided, July 18, 1912.

*Boundary—Between Adjacent Lands Not Changed by Consent Verbally  
Given—Adverse Possession—Fences—Estoppel—Injunction.*

Where a fence has been recognized for more than twenty-one years as the true line between the lands of adjacent owners, the procuring by one of the owners of a survey which located the line twelve feet over on his land, together with a verbal direction given by him to the adjoining owner to build a new fence on the new line, does not estop such owner from afterward insisting that the line of the old fence shall be treated as the dividing line; and in such a case injunction lies to restrain the adjoining owner from the ancient line.

*Reed & Beach*, for plaintiff.*Chapman & Taggart*, contra.

DEVOR, J.

The plaintiff, George W. Thomas, filed a petition in this court, August 26, 1911, against the defendant, George W. Webber, and for cause of action says that he is seized in fee simple of seventy-five acres and ninety-nine rods in Green township in Section 4. The defendant is the owner in fee simple of an adjoining farm in Section 4.

The land of plaintiff is divided from the land of defendant by a line running east and west, which line is marked by a fence, which has stood on the same line for more than forty years, the land of the plaintiff lying on the north and contiguous to the land of the defendant.

On or about March 18, 1911, the defendant removed said fence from its ancient and established line, over and upon the land of this plaintiff about twelve feet, and extending along said

line for a distance of about fifty-five rods, and committed other acts of trespass upon the lands of this plaintiff by digging holes and setting posts. Plaintiff was compelled to and did, for the purpose of protecting his land and preventing waste thereon, remove said posts and fence from his said land.

Plaintiff prays that the defendant be restrained from removing said line fence over upon the land of the plaintiff, and for such other relief as he may be entitled to upon the final hearing.

The defendant filed an answer to this petition, and admits that the plaintiff is seized in fee simple of certain real estate in Green township, north of and contiguous to the defendant's real estate.

Defendant admits that the real estate of defendant is divided from the real estate of the plaintiff by a line running east and west, and that on or about March 18, 1911, defendant removed from its location portions of a certain fence, which then separated the aforesaid lands of plaintiff and defendant.

Defendant avers that prior to March 18, 1911, plaintiff procured the line between their lands to be surveyed and marked out, and notified defendant to build his share of the fence upon said line; plaintiff told defendant that said line was the true and correct boundary line between their lands; that, relying upon the notice and statement of plaintiff, defendant removed certain portions of the fence, and set a number of posts upon the line marked out by the surveyor, which were afterwards removed by plaintiff.

Defendant denies that he committed any acts of trespass, or threatened to commit any acts of trespass, upon plaintiff's land, and denies each and every other allegation of plaintiff's petition, not herein admitted.

Defendant further avers that whatever he did in removing the fence or in setting posts was done by him in accordance with plaintiff's notice to defendant, and in reliance upon his statements regarding said line, and that plaintiff is thereby estopped to maintain his action, or to claim the relief asked by him in his said petition.

1912.]

Thomas v. Weber.

For a cross-petition defendant avers that the plaintiff removed fifty-five posts, which had been set by defendant, and filled up sixty-seven post holes, which had been dug by defendant, to plaintiff's damage in the sum of \$50.

Defendant prays that the petition be dismissed, that he may have judgment for \$50, and that the court make such order in this cause regarding the respective rights of the parties herein as may be required by justice and equity, and for all necessary and proper relief.

This case was submitted to the court upon the evidence and the above pleadings. It is a contention over a small strip of land, arising over changing the location of an old line fence between their lands. Now and then there is litigation over a line fence, and one would think the law would be settled, and there would be no occasion for such cases. Every case, however, is liable to have new features in it. The facts in this case are substantially as follows, to-wit:

The fence on the old line had been there thirty to thirty-five years. It was crooked, made so, for some reason, by former owners. The plaintiff wanted a new fence, and wanted to make it straight. Defendant wanted it on the old line. The plaintiff claimed the defendant had part of his land, and he was going to charge him rent for same. Plaintiff wanted to know if defendant would pay part of the expense of making a survey. Defendant refused. The plaintiff had the subject on his mind, and could not forget it, and he called out the surveyor himself, without the aid of the defendant, and had him make a survey and ran the line between their lands, and paid the surveyor himself. Defendant was present at the survey and watched the proceedings. The surveyor ran the line straight, but largely on the plaintiff's land, instead of on the defendant's land, as the plaintiff had expected. Plaintiff told the defendant when the survey was completed that "The line is fixed now, and you can go ahead and build your fence accordingly." Plaintiff told the surveyor that the line did not come where he expected it, but he would submit and build his fence on it. Defendant began the next morning to set posts on the new line about twelve feet from the old line on plaintiff's land.

The next day the plaintiff was making some measurements on the line, and did not tell the defendant to stop. Defendant says he told him to go on and build his fence. The plaintiff denied doing so. In a few days, however, plaintiff, after consulting a lawyer, had his eyes opened to the situation, and came home and notified defendant to stop building the fence on the new line and brought this action, after he had removed the posts set by defendant, and filled up the holes. The defendant insists upon his right to build the fence on the new line, and the court is called upon to determine where the fence should be located, without regard to the form of this action.

It is conceded that the old line fence had been upon its location for more than twenty-one years, and that those parties and their predecessors in title had possession of the land up to the fence for same period of time, and farmed and pastured the same. There never was any contention over it until the plaintiff got the subject on his mind. The plaintiff started the contention, got the surveyor, and started this action, and now wants the fence on the old line.

It is the law of this state that where one of two owners of adjoining lands, respectively, holds actual, known and exclusive possession up to a certain line, for the full period of twenty-one years, he has thereby acquired title up to such line, whether the line be the true line or not. That is, a line thus fixed is not subject to attack upon the ground that such line is not the real or true line, and can not be changed by the surveyor without a proper agreement to change the line by the owners of the land. *Yetzer v. Thoman*, 17 Ohio St., 130; *Smith v. McKay*, 30 Ohio St., 409; *Brown, Stat. Frauds*, Section 75; *3 Washburn, Real Prop.*, 160; *Wilson v. Wilson*, 6 N.P.(N.S.), 493; *Fletcher v. Fuller*, 120 U. S., 534; *McNeely v. Langan*, 22 Ohio St., 32; General Code, 8533.

Does the evidence in this case prove an agreement between those parties to establish a new line as run by the surveyor? The court can not find from the evidence that there was such an agreement or a meeting of the minds of these parties to establish a new line. The evidence is not sufficient to establish

1912.]

Thomas v. Weber.

such an agreement. The defendant refused to agree to anything before the survey was made and after the survey he said nothing, and began to build fence the next day, induced by the thought probably of gaining a small strip of land, twelve feet wide.

The plaintiff the next day was measuring the land himself to see if the survey was correct. He was not satisfied, and told the surveyor so.

An agreement arises from the mutual intentions of the parties. Their wills and thoughts upon the subject of the agreement must be in mutual accord before an agreement can be said to exist between them. Besides, the answer does not allege that there was an agreement.

Is the plaintiff estopped by his acts and conduct from now insisting upon the old fence as the line? Does the calling of the surveyor, making the survey on the new line, stating to the defendant after the survey was made to build his share of the fence, and the defendant thereupon set a number of posts on the new line, estop the plaintiff in this action from claiming the land up to the old line? The court is of the opinion that it does not.

Judge Spear in the case of *Ensel v. Levy*, 46 Ohio St., 259, says:

“The general doctrine of estoppel is stated in varying forms,” and, after quoting from a number of authorities, gives the rule as to an estoppel, “that, where one, by his acts or declarations, made deliberately, and with knowledge, induces another to believe certain facts to exist, and that other rightfully acts on the belief so induced, and is misled thereby, the former is estopped to afterwards set up a claim based upon facts inconsistent with the facts so relied upon, to the injury of the person so misled.”

This rule is approved and followed in the case of *Pennsylvania Co. v. Platt*, 47 Ohio St., 383. This case involved a question of title to real estate, and the court on page 385 says:

“It is, we think, by these and other adjudications in this state, fully established that in order to estop an owner from

asserting title to his property, by his declarations and conduct, it must appear that he was, at the time, apprised of the true state of his title, that he knew or had reason to believe his declarations or conduct would be acted upon by another, that they were acted upon by such person in ignorance of the title, and that such person will be injured by allowing the truth of the admission by the declaration or conduct so acted upon by him, to be disproved; and, while an owner who stands by, and without objection sees a railroad constructed on his land, will, after the road is completed, or large expenditures have been made thereon, upon the faith of his apparent acquiescence, be estopped from reclaiming the land, or enjoying its use by the railroad company, he is not thereby estopped from claiming compensation for its value."

It is a difficult matter to change an old line fence under the law of Ohio, that has stood for more than twenty-one years. When the title to the land has become vested in the owner to the old line by adverse possession, the proper course to pursue is to have a written agreement.

Judge Thurman said, in the case of *Walker v. Devlin*, 2 Ohio St., 593, 607:

"That proprietors of adjacent lands may, by verbal agreement and occupancy, fix a disputed and uncertain boundary, is not denied, but it has never been held, so far as we can discover, that a bare trespasser, having no title whatever, can, by such an agreement, become the owner of his neighbor's land."

"A parol agreement to establish a new boundary line between adjoining properties, where the true boundary is neither indefinite nor uncertain, is void, under the statute of frauds." *Vosburgh v. Teator*, 32 N. Y., 563; *Nichol v. Lytle*, 12 Tenn., 456; *Olin v. Henderson*, 120 Mich., 149; *Pickett v. Nelson*, 79 Wis., 9, 12; *Sanford v. McDonald*, 53 Hun., 263.

This disposes of all the questions made in this case, and the finding of the court is in favor of the plaintiff, and against the defendant on the issues. Each party ordered to pay their own costs.

Judgment accordingly.

1912.]

Walter v. Soap Co.

**CLOSE QUESTION AS TO WHETHER THE INJURED PLAINTIFF  
WAS A VOLUNTEER.**

Common Pleas Court of Hamilton County.

BRUNO WALTER V. THE AMERICAN SOAP COMPANY ET AL.

Decided, April 5, 1912.

*Pleading—Allegations Sufficient to Save the Plaintiff from the Rule Denying to a Volunteer the Right to Maintain an Action for Injuries.*

Where a plaintiff, suing for damages for injuries, names his own employer and a tenant of his employer as defendants, and alleges that the injury occurred while he was assisting the foreman of said tenant, and that the assistance was being rendered at the request of said foreman, and that as the owner of the premises it was beneficial to his own employer, a demurrer interposed by said tenant does not lie on the ground that the plaintiff at the time of the accident was acting as a mere volunteer.

*Gustav R. Werner*, for plaintiff.

*Galvin & Bauer*, contra.

GORMAN, J.

On demurrer to amended and supplemental petition.

A demurrer was filed to the petition herein some time ago, on the ground of a misjoinder of parties defendant, and on the ground that the allegations of the petition do not show facts sufficient to constitute a cause of action against American Soap Company, defendant.

I sustained the demurrer to the petition on both grounds. Thereupon the plaintiff amended his petition, and filed what he calls an amended and supplemental petition against the American Soap Company only, without asserting any claim or cause of action against the other defendant, Brankamp.

The original petition filed against the defendants undertook to hold the American Soap Company and Lewis S. Brankamp,

its general manager. The petition also disclosed that the plaintiff who claimed to have been injured while lifting a barrel of soft soap belonging to the defendant company by reason of the negligence of Brankamp, was a mere volunteer, and I held that as such he could not recover against the company for any damages which he sustained while thus acting. In his amended and supplemental petition, plaintiff has set up allegations, which to the mind of the court discloses that he was not a mere volunteer. He alleges that at the time of the injuries which he sustained, he was in the employ of Albert and Mary Eckerlein; that the defendant company was a tenant of Albert and Mary Eckerlein, at No. 11 West Clifton avenue, Cincinnati, Ohio; that Lewis S. Brankamp was the general manager of the defendant company; that he requested Albert and Mary Eckerlein to permit the plaintiff to act with him, Brankamp, for the purpose of delivering a barrel of soft soap weighing about seven hundred pounds, to one George Hammerding, at Vine and Elder streets in Cincinnati. He further avers that his employers, Albert and Mary Eckerlein, requested him, the plaintiff, to comply with such request and to accompany Brankamp and assist him in the delivery of the soap. He further avers that at this particular time when the request was made of him to accompany said Brankamp, the said Brankamp was the general manager of the defendant company, and as such general manager, he had the power and authority to employ servants on behalf of the defendant company, to direct and control their movements and to discharge them when he saw fit. He then sets out the manner in which he was injured.

There are two cases in Ohio which touch upon this proposition of the liability of a defendant to a plaintiff who was injured under some such circumstances. *Railway Company v. Bolton*, 43 O. S., 224; *Railroad Company v. Marsh*, 63 O. S., 236.

The question to be determined in this case is whether or not the plaintiff was a mere volunteer at the time he was injured. The allegation as to the authority of Brankamp to employ plaintiff as the general manager of the company, and that it was at the request of the plaintiff's employers, Albert and Mary Eckerlein,



1912.]

Walter v. Soap Co.

that he accompanied Brankamp and assisted him in delivering the soap, whereby he was injured, did not appear in the original petition.

Judge McIlvain, in *Street Railway Co. v. Bolton*, 43 O. S., 226-227, says:

“It is also well settled that a person who without any employment, voluntarily undertakes to perform services for another, or to assist the servants in the service of the master, either at the request or without the request of such servants, *who have no authority to employ* other servants, stands in the relation of a servant for the time being, and is to be regarded as assuming all the risks incident to the business.”

Now this case at bar is distinguishable from the case in 63 O. S., and is similar to the case in 43 O. S. just cited, because Brankamp, the general manager, is alleged to have had authority to employ servants for the prosecution of his employer's or master's business, the defendant company. It is also alleged that the plaintiff did not act voluntarily, but at the direction and request of his own employers, and this we think, takes the case out of the class of a mere volunteer.

This question was present in the case of *Eason v. S. & E. T. Railway Co.*, 65 Texas, 577.

In that case the facts averred were that the plaintiff was not an employe of the railway company, but he was in the employ of the owners of a mill that shipped lumber by the railway company's cars. The plaintiff's business was to load lumber on the cars for his employers, the owners of the mill. The car which he attempted to couple to the train was placed in the situation it occupied for the purpose of being loaded with lumber by the servants of the owners of the mill. The car was so located that it could not be conveniently loaded, and to have it hauled upon the track was a matter of interest to *the plaintiff's employers*. This fact was called to the attention of the conductor of the train by the plaintiff himself, acting on behalf of his employers, the owners of the mill. The conductor being short of brakemen, asked the plaintiff to couple the car desired, to the one immediately in front of it, which the plaintiff consented to do; and in

its performance, received the injury complained of, through the negligence of the engineer. The service the apellant was performing at the time was in furtherance of the master's interest in having the car placed where it could be loaded more conveniently, and, hence, expedited in starting for the destination of the lumber. He was still acting in the capacity of a servant for Carlisle & Snelling, the owners of the mill; was doing so at the request, and, of course, with the permission of the defendant company. A demurrer was interposed to this petition and sustained by the lower courts upon the theory that the plaintiff in the case was a mere volunteer. The Supreme Court reversed the lower court and held that it was error to sustain the demurrer.

I think that the averments of the amended and supplemental petition in the case at bar bring the plaintiff's case well within the rule laid down in 65 Texas, 577. See also the case of *Wright v. London & N. W. R. R. Co.*, 1 Q. B. Div., 252.

In view of the changed averments in the amended petition, I am of the opinion that the demurrer should be overruled.

It is a close case at best, and turns upon the question of whether or not the assistance rendered by the plaintiff to the defendant company at the request of Brankamp was a benefit to the plaintiff's employers, Albert and Mary Eckerlein. It certainly was no benefit to himself, but inasmuch as he was in the employ of Albert and Mary Eckerlein, and the defendant company was a tenant of theirs in their premises, and it is averred that it was for their interest and beneficial to them, that the plaintiff should assist the defendant company, I am of the opinion that these averments are sufficient to make the amended and supplemental petition proof against the demurrer.

The demurrer will therefore be overruled.

1912.]

Morton v. Brotherhood.

**LABOR TROUBLES.**

Common Pleas Court of Hamilton County.

PH. MORTON V. THE BROTHERHOOD OF PAINTERS, DECORATORS AND  
PAPERHANGERS OF AMERICA; SIGN WRITERS' LOCAL UNION  
No. 224, OF CINCINNATI, OHIO, ET AL.

Decided, June 5, 1912.

*Strikes and Labor Troubles—Blanket Injunction Will Not be Issued  
Against a Labor Union—Nor Against Individual Members, Unless  
—Attitude of a Court of Equity With Reference to Disputes Between  
Capital and Labor.*

A court of equity, in carrying out its recognized duty of refusing to permit either employer or employe to terrorize the other, must also refuse to permit that it be itself made a scarecrow by issuing an injunction for the purpose of frightening either side; from which it follows that a blanket injunction will not be issued against a labor union for the purpose of restraining its unnamed members from committing offenses, nor against individual members of a union except upon hearing; or if the circumstances are such as to require the issuance of such an order without notice, the reason therefor must be of sufficient force to require that it be set forth in an entry.

*Frank M. Coppock, for plaintiff.*

*Nicholas Klein, for the unions.*

DICKSON, J.

It is claimed that certain unions by resolution ordered certain illegal means to be taken to injure the business of the plaintiff—one Morton, a sign painter—and for this reason the court is asked to issue an injunction against a union and thus by service on its officers to restrain its members from committing offenses, and thus if any member of the union violate such an order, hold him in contempt of court and punish him therefor; and this court also is asked to permit the plaintiff herein to publish by posting throughout the vicinity such an order, to the end that

any one violating the order may be punished for contempt of court.

The union as such is a lawful body possessed of certain rights and duties. The union as such has no authority to bind its members by resolving to commit offenses. When members of a union threaten to commit or do commit offenses, they are acting as individuals, and they can not be compelled to do such wrongs by any resolution or any act of the union. Nor can they, if they commit an offense, hide behind any order of the union.

In the matters complained of this court has no authority to enjoin the union. It can not in these matters punish the union. It can not serve summon's on the members of the union by proclamation. It is not proper for a court to violate the law to prevent the law being violated. The court should not permit itself to be used as a scarecrow. It is not wise for a court to make an order which it can not carry out; indeed, it has no power so to do. No court has a right without a duty, and the duty here lies in doing complete legal justice and without fear. This court is not a police court. We know as a rule persons who commit offenses as individuals and by name. This court has power to restrain individuals who threaten to injure property rights. It has no power to restrain the commission of crimes or offenses against the state. This power is with the police department. This court will not permit the employer or the employe to terrorize the other, nor will it permit either to obtain any writ for the mere purpose of terrorizing any one.

In contempt proceedings the offense and the offender should be definite and certain and the punishment or discharge certain and sure. This court will not permit any one to obtain an injunction without a hearing, nor will it permit a temporary restraining order unless notice to the other side be given or a good reason be given for its omission, and a reason of sufficient force to require an entry setting forth the reasons therefor, so that all may know the same and so that punishment for contempt may be inflicted if the court has been deceived in omitting notice.

1912.]

Fowler v. Benner.

**PLACES OF PUBLIC ACCOMMODATION UNDER THE CIVIL RIGHTS STATUTE.**

Common Pleas Court of Cuyahoga County.

LEROY FOWLER v. C. T. BENNER.

Decided, August 8, 1912.

*Civil Rights—Confectionery and Ice Cream Parlor Falls Within the Statute, When—Exclusion of a Colored Man—His Right to Maintain an Action for Damages Upheld—Section 10213—Meaning of the Words "Public Accommodation."*

A confectionery store and ice cream parlor, where foods and refreshing non-intoxicating drinks are served, and tables, chairs and other conveniences are provided for the convenience of customers, is a place of "public accommodation" within the meaning of the civil rights statute.

*Sutton & Brown*, for plaintiff in error.

*Lang, Cassidy & Copeland*, contra.

FORAN, J.

On October 4, 1910, the plaintiff in error filed a bill of particulars in the justice court of R. T. Morrow, asking damages against the defendant in error in the sum of \$300 for being wrongfully refused accommodations by the defendant in error, at his place of business on Hough avenue, in the city of Cleveland, Ohio.

On October 29, 1910, the cause was tried to a jury. At the conclusion of the plaintiff's testimony, on motion of the defendant's counsel, the court directed the jury to return a verdict for the defendant, which was accordingly done; to all of which the plaintiff then and there excepted, and now prosecutes error to this court to reverse the judgment so rendered against him.

The action was brought and is prosecuted under and by virtue of Sections 4426-1 and 4426-2, Revised Statutes (Sections 12940 and 12941, General Code), which it is claimed confer a right of action on the plaintiff in error, if the allegations in his bill of particulars filed in justice court are true.

The statutes which confer this right of action provide, substantially, that all persons of every race and color, regardless of race and color, within the jurisdiction of the state of Ohio, shall be entitled to the full enjoyment of the accommodations, advantages, facilities and privileges of inns, restaurants, eating houses, barber shops, public conveyances, theaters "*and all other places of public accommodation*"; and for any denial of the full and equal enjoyment of these rights to any citizen, except for reasons applicable alike to all citizens, a right of action accrues to the citizen aggrieved by such denial, against the person denying him such rights or refusing him such accommodations, in an amount not less than fifty nor more than five hundred dollars.

It appears from the record or bill of exceptions that the plaintiff in error, Leroy Fowler, is what is popularly known as a colored man; that he is a citizen of the state of Ohio; that on the 8th day of August, 1910, accompanied by his wife, he entered the defendant's store or place of business and took a seat at a table; that there were no other customers in the place at the time, but shortly thereafter a white lady came in, and, at her request, was served with ice cream soda and candy; that upon his request that he and his wife be served with chocolate soda, the defendant said, "I am sorry; I can't serve colored people"; that the store or place of business of the defendant had a sign on the window, stating it was a confectionery store; that ice cream, soda water, candy, cigars and magazines were there displayed for sale; and that it might be called an ice cream parlor; that on the table, where the plaintiff and his wife sat there was a bill of fare, showing or indicating the drinks offered for sale. It further appears that the plaintiff in error had been to the store before August 8th, 1910, and had purchased candy there; and that he and his wife left the store after the defendant had refused to serve them as above stated.

The defendant in error did not introduce any testimony.

From this record it may fairly be said that the defendant's place of business is a confectionery store and what may popularly be denominated an ice cream parlor. The only question, then, before the court is this: Is a confectionery store and an

1912.]

Fowler v. Benner.

ice cream parlor a place of public accommodation? If it is, the judgment of the justice must be reversed; if not, it must be affirmed.

A confectionery store is a place where confections, such as candies, candied fruits, bon bons, caramel comfits, cake and ice cream and other articles prepared with sugar are usually sold. An ice cream parlor is a place where ice cream and confections are sold. It is supplied with tables and chairs for the accommodation and convenience of its patrons. It is also generally, if not invariably, provided with what is known as a soda fountain, by which its patrons may be furnished with a great variety of refreshing drinks, including coffee, either hot or cold. Does such a place come within the meaning of the language used in Section 4426-1, Revised Statutes? This section, after specifically naming inns, restaurants, eating houses and theaters, says and includes "all other places of public accommodation and amusement"; that is, all other places of a similar or like nature, kind and character to those specifically enumerated (*Schultz v. Cambridge*, 38 O. S., 659). Is an ice cream parlor and confectionery store, where the patrons of the place are provided with tables, chairs and such conveniences and furnished with food and drink, a place similar to or of the same general character and kind as an eating house or a restaurant? It seems to us that it is, and that there is no such dissimilarity between the two as would justify any other conclusion.

It will not be denied that ice cream, cake and confections of all kinds are foods. A cafe or coffee house where food is furnished patrons is surely of the same general character as a restaurant; and a cafe chantant where the patrons are, in addition to food and drink furnished, also regaled with music and singing of an histrionic character, may also be said to be a place of the same general kind and character as an eating house and a theater. A moving picture show, no matter by what name called, is of the same kind and character as a theater. So, too, a lunch room, or a room furnished with a buffet and tables and chairs for the convenience of customers or patrons, would fall within the purview of the statute as a place of the same kind and character as a restaurant or eating house.

The contention of counsel for the defendant in error, that the words of the statute "all other places of public accommodation and amusement" mean, and must be construed to mean, that the place must be one of amusement as well as of accommodation, can not be entertained. The statute specifically enumerates inns, restaurants, eating houses, barber shops, public conveyances; and the words following, "and all other places of public accommodation and amusement," must be taken to refer to the places previously enumerated respectively; that is, to places of the same general character as inns, restaurants, eating houses or theaters. An inn or an eating house is not a place of amusement, nor is a theater a place similar to an eating house, but primarily a place of amusement or entertainment of a purely intellectual or mental character. These words, then, mean all other places of public accommodation, or all other places of public amusement; and may be construed and read *or* whenever the sense requires it.

It may not be unprofitable at this time to inquire what is meant by "a place of public accommodation." Anderson's law dictionary defines the word public, when used as an adjective, as in the phrase "public accommodation," to mean, concerning or affecting the people or community at large; or, a place for the accommodation of all persons. A public place may be defined, generally, to be a place to which any one may have access without trespassing (see Century Dictionary). Under this definition, a person who, by reason of his disorderly habits or condition, would be objectionable to the management or patrons of such public place, might be deemed a trespasser and be ejected therefrom and if the place was one of public accommodation and came within the purview of the statute under consideration, such objectionable person or citizen might be denied access to such a place without violation of this statute, provided the rule applied to all persons and citizens irrespective of race or color.

The word "accommodation," as used in the statute, does not mean to do a favor to a person, such as to loan him money or endorse a note. "A place of accommodation," as used in the statute, means a place where the wants and desires of those who frequent the place may be supplied for a consideration. The word



1912.]

Fowler v. Benner.

“place” expresses simply locality, and not of any particular kind unless qualified by an adjective.

The statute in question is based upon the Fourteenth Amendment to the Federal Constitution. In 1866 the Congress of the United States passed what is known as the civil rights bill. The constitutional objection to this bill is, that the federal Congress undertook to perform the duty of protecting the civil rights of citizens, a duty which has always been held to be peculiarly within the province of the sovereign states of the Union; hence the Fourteenth Amendment, which contains the gist of the civil rights bill. All the states of the Union have passed statutes in conformity with the Fourteenth Amendment, and in many instances similar in phraseology. The inhibition contained in the Fourteenth Amendment was intended to secure to a recently emancipated race all the civil rights that the dominant race theretofore had enjoyed (*Ex parte Virginia*, 100 U. S., 212). It has exclusive reference to state action.

If a law operates alike upon all persons and property similarly situated, it is not in conflict with the amendment. If it does not so operate, it is in conflict with it. 127 U. S., 205; 128 U. S., 578.

The statutes of Ohio, it may be said, operate alike upon all persons and citizens, and are therefore not in conflict with this provision of the federal Constitution.

Counsel for the defendant in error relies largely upon the case of *Faulkner v. Solozzi*, 79 Conn., 541. In this case it was held that barber shops were not places of public accommodation. Counsel seems to overlook the fact, however, that the Connecticut statute bears no similarity to the Ohio statute, inasmuch as the statute is general in terms and does not specifically enumerate in precise terms the places where every person shall be entitled to the full and equal enjoyment of the advantages and privileges of such place of public accommodation. The Connecticut statute provided that every person who deprives another of “the full and equal enjoyment of the advantages, facilities, accommodations and privileges of any place of public accommodation or amusement or transportation” on account of race or color shall pay double damages to the person injured

thereby. A glance at this statute and the words employed is sufficient to show that the court was given wide latitude in construing the language and giving construction to the words "place of public accommodation." Such latitude of construction is limited in the Ohio statute by the specific enumeration of places, followed by the words "and all other places of public accommodation." For instance, the Ohio statute enumerates inns, restaurants and eating houses, and "all other places" of the same general character or kind as an inn, eating house or restaurant.

The Connecticut decision proceeds upon the theory of the common law definition of place "affected by public interest," which, under the common law, was subject to public regulation, such as *quasi*-public utilities and such as affect the community at large as railroads, telegraphs, telephones, theaters, and gas and water companies. In the opinion of the court the language of the Connecticut statute was not sufficiently broad to include within its scope barber shops.

The case of *Cecil v. Green*, 161 Ill., 265, is also quoted in support of the contention of the defendant in error. In this case it was held, and properly so, that a drug store in which soda water is sold is not a place of public accommodation. A drug store is primarily a place where drugs and medicines are vended and sold, and the soda water fountain is merely an adjunct. A place where soda water alone is sold can not possibly be said to be similar in nature and character to an eating house; but a place where ice cream, confections and cake, which are foods, are sold to patrons, who are furnished with the conveniences of tables and chairs, is in the opinion of the court decidedly a place of the same general kind and character as an eating house or lunch room.

A place of public accommodation, within the meaning of this statute, is generally a resort where those who frequent it remain more or less at ease and comfort for some considerable length of time for the purpose of being physically refreshed and benefited, and for the purpose of transacting business with those who accompany them or those they meet there, by appointment or otherwise. Hence a drug store, a dry goods store,

1912.]

Fowler v. Benner.

a grocery store or similar establishment is not a place of public accommodation within the meaning of this statute.

The case of *Keller v. Koerber et al*, 61 O. S., 388, is also cited. In this case it is held, that a place where intoxicating liquors are sold at retail is not within the phrase "all other places of public accommodation and amusement." The opinion in this case is a *per curiam*, and is not, we freely admit, as conclusive and illuminating as we might wish. In speaking of places where intoxicating liquors are sold as being within the meaning of the phrase "all other places of public accommodation and amusement," the court says: "This view is much discouraged by the dissimilarity between a place where intoxicating liquor is sold and those which the statute specifically designates." This is not wholly satisfactory. We must look further to obtain the real basis of the decision. The court proceeds to say, that the policy of the state of Ohio is opposed to the traffic in intoxicating liquor, assuming that it is an evil, and seeks to discourage and restrict it, and for that reason the court refused to "interpret this statute as encouraging a traffic which the clearly defined policy of the state discourages.

It is true the court says the statutes of Ohio forbid, under penalties, the sale of intoxicating liquors to minors and persons intoxicated or in the habit of becoming intoxicated, and for that reason a condition should not be inferred which would place the saloon keeper in peril when he refuses to sell to any one; but inasmuch as these statutes apply alike to all persons, regardless of race or color, this can not be the real basis of the decision, which seems to rest clearly upon the theory that this statute should not be so interpreted or construed as to encourage a traffic which the clearly defined policy of the state discourages, by holding that a saloon is a place of public accommodation.

This is in line with the doctrine announced in 74 Minn., 200, where it is held that a saloon does not fall within the provisions of the law containing the general phrase, "all other places of refreshment." It may surely be said that there is a decided difference of opinion as to whether intoxicating liquors are a refreshment. Possibly, taken in but moderate quantities, they may refresh and exhilarate, but if taken to excess, they paralyze

and destroy. And for this reason we are not enlightened by the doctrine of 74 Minn. Referring, however, to the Ohio case of *Keller v. Koerber*, 61 O. S., 388, it clearly appears that a saloon was held not to be a place of public accommodation and amusement, for the reason that the clearly defined policy of the state discourages the traffic in intoxicating liquors and regards this traffic as an evil. The decision being based solely upon that ground, it follows, inferentially, that if a saloon or a place where intoxicating liquors are sold was not in conflict with the clearly defined policy of the state, it would be held to be a place of public accommodation. If this be true, how much greater reason have we for holding that a place furnished with tables and chairs and other conveniences for those who frequent it, and where foods and refreshing non-intoxicating drinks are furnished, is a place of public accommodation.

It is true that the civil rights statutes are, to some extent, in derogation of private rights, and restrictive of the liberty which a citizen ordinarily enjoys to deal only with those persons with whom he chooses to hold business relations. But it must be remembered that the court assumes no responsibility for the enactment of these laws. The duty of the court, in this instance, is wholly that of interpretation and construction; besides, we believe that, as a general rule, a gentleman, whether white or colored, will never obtrude himself into a place where he knows his presence may be embarrassing or objectionable to the proprietor or his customers.

The statute in question does not prevent the proprietor of any place of public accommodation from refusing to serve any person who, by reason of his disorderly conduct and habits, is objectionable to him or his patrons; but in the exercise of such right of refusal he must not discriminate against a man solely on account of his color or race. He must treat all citizens, irrespective of color or race, precisely alike.

For the reasons above indicated, the judgment of the justice court will be reversed and the case retained in this court for further proceedings.

1912.]

In re Patent Wood Keg Co.

**TAXES PAYABLE BY A CORPORATION IN PROCESS OF DISSOLUTION.**

Common Pleas Court of Hamilton County.

IN RE THE PATENT WOOD KEG COMPANY.

Decided, July 29, 1912.

*Taxation—Duty of Receiver with Reference to Return for Taxation—Of Property of a Corporation in Process of Dissolution—Section 11945.*

Where a corporation is in court for the purpose of dissolution, the receiver thereof will return for taxation the personalty so coming into his hands and will be required to pay taxes on the real estate belonging to the corporation due and to become due for the current calendar year.

*Paxton, Warrington & Seasongood*, for the receiver.

*Thomas L. Pogue*, Prosecuting Attorney, *John V. Campbell* and *Charles A. Groom*, Assistant Prosecuting Attorneys, for *William A. Hopkins*, County Treasurer.

DICKSON, J.

All the property, real and personal, belonging to the Patent Wood Keg Company under the provisions of Section 11938 of the General Code and certain steps taken in this court and particularly the decree of dissolution of date February 7, 1912, is in the hands of a receiver—subject to the order of court.

The treasurer of Hamilton county has made application to require the receiver to pay taxes on the real estate for the year 1912, and return all of the property in his hands subject to taxation for the year 1912 and to retain sufficient money to pay the taxes thereon, and the receiver asks this court for advice in the premises.

From Sections 5328, 5370, 5372 and 5375 it is clear that all personal property in Ohio not specifically exempt is subject to taxation.

Under Section 11943 of the General Code a receiver was appointed and the corporation ceased to exist February 7, 1912.

Under Section 11945 of the General Code the receiver became vested with all the assets of the corporation from the time of filing his bond February 9, 1912, and was thereafter trustee of this estate for the benefit of the creditors and stockholders of the corporation, with all the powers conferred by law upon trustees to whom assignments are made for the benefit of creditors. This corporation with all its assets—real and personal—is in this court for the purpose of being settled. The court, through its receiver, takes the place of the corporation. The receiver is in effect the corporation.

Our Supreme Court in *McNeill, Assignee, et al v. Schott, Treasurer*, 51 O. S., 255, has held that personal property held by an assignee of an insolvent debtor whose estate is being settled in the probate court is not subject to taxation.

Must personal property held by a receiver of a corporation in process of dissolution, of being settled in this court, be duly returned by the receiver and be subject to taxation?

Section 11945 of the General Code provides:

“Such receiver shall be vested with all the estate, real or personal, of the corporation, from the time of his filing the security required by law, be trustee of such estate for the benefit of creditors of the corporation and its stockholders, and have all the powers conferred by law upon trustees to whom assignments are made for the benefit of creditors.”

For taxation purposes are receivers of corporations in dissolution to be treated like assignees of insolvent debtors? The powers are the same—both are trustees. As a general rule all trustees pay taxes on trust property. Section 5370.

Section 6372 of the General Code provides:

“Personal property of every description \* \* \* shall be listed in the name of the person who was the owner thereof on the day preceding the second Monday of April in each year.”  
\* \* \*

The Supreme Court had before it the above when it decided the *McNeill, Assignee*, case. That court evidently considered the creditors the owners. In an assignment being settled in court it is the duty of the creditors to return and not the duty

1912.]

In re Patent Wood Keg Co.

of the assignee. It would be necessary for this court to follow that holding as to assigneeships. But how stands this case?

In an assignment there is a grant. The grantor ceases to be the owner, his only interest being a contingent remainder.

In this receivership there is no grant. Whatever vesting there is is for control only. The corporation is still the owner and remains the owner until final distribution. The property still exists. Had certain court proceedings not been taken the property would be returned by the corporation even though insolvent. The mere change of name—corporation to receiver—would not make or unmake double taxation. The court, and through it the receiver, stands in the shoes of the owner.

Section 5370 of the General Code provides:

“Each person of full age and sound mind shall list the personal property of which he is the owner \* \* \* the property of corporations whose assets are in the hands of receivers by such receivers.”

The word assignee is not in this section. This court does not believe that such an omission is significant, but that the omission was due rather to carelessness—that to all intents and purposes the word assignee should be read into the statute or put there by the General Assembly. However, receivers are not omitted. Thus reason and the law both require the receiver to return and to pay.

The decision in the McNeill, Assignee, case is not altogether satisfactory. The gist of that decision is that the assets of the assigned estate were “being settled.” The question at once arises, what is meant by “being settled”?

Our Supreme Court in *French, Treasurer, v. Bobe, Assignee*, 64 O. S., 323, in distinguishing the McNeil case, say that Bobe, Assignee, should return because with the consent of all and with the approval of the court, Bobe, Assignee, was conducting the business for profit, not to pay the debts.

The court in the Bobe, Assignee, case at page 341, say:

“As a general rule it may be said that there is no sound principle upon which the property of a person or a corporation in the hands of a receiver to be managed for the interests of those

concerned, can be regarded as exempt from the burden of taxation."

The assignee or the receiver—both are trustees—must return the property in their care for taxation in their names as trustees.

Section 5370. " \* \* \* The property of a person for whose benefit property is held in trust by the trustee." \* \* \*

Our Supreme Court in the McNeill case (*supra*), say that when property in the hands of an assignee is "being settled," that as the creditors return this property, therefore the assignee need not return it for taxation. In the Bobe, Assignee, case (*supra*), the same court say that the estate was not *being settled*, therefore the assignee must return for taxation.

*Quaere*—Is any estate in any court rightly, except when in the condition or state of being settled?

To require the creditors of a concern in the hands of the court to return their claims for taxation is productive of neither good morals nor much money.

The receiver herein will be required to return the personal property of his estate as of the day preceding the second Monday of April, 1912. He will also be required to pay the taxes on the real estate for the year 1912. The real property held by the receiver is subject to taxes on the day preceding the second Monday of April, 1912, and will be paid by him as receiver. The receiver will also pay the last half of the taxes for the year 1911, due June, 1912.



1912.]

In re Dunlap.

**INVALIDITY OF LOITERING ORDINANCE.**

Court of Insolvency of Hamilton County.

IN RE STELLA DUNLAP; IN RE SAMUEL DIXON; AND IN RE  
FRED STEWARD.\*

Decided, March 5, 1912.

*Loitering—No Authority Conferred Upon Municipalities to Prohibit by  
Ordinance—Disorderly Conduct—Sections 3658 and 3664.*

1. Municipalities are without statutory authority for the enactment of an ordinance making loitering or wandering about the streets a crime.
2. Disorderly conduct is not defined by any Ohio statute, or by any ordinance of the city in which the accused was convicted of loitering, and the court is unable to sustain the conviction by holding that loitering constitutes disorderly conduct as a matter of law.

*A. Lee Beaty*, for Stella Dunlap and Samuel Dixon.

*W. W. Hester*, for Fred Steward.

*Bernard C. Fox*, Police Court Prosecutor, contra.

WARNER, J.

Heard on applications for writs of habeas corpus.

These persons were committed to the city workhouse by the police court, having been found guilty of loitering—wandering about the streets—contrary to a part of the provisions of Section 907, city ordinances. There is no statutory authority giving a municipality power to make loitering or wandering about the streets a crime, unless it be found in Sections 3658 and 3664 of the General Code, granting authority to prevent and punish persons guilty of “disorderly conduct.”

But “disorderly conduct” is not defined in any statute or ordinance, and the court is unable to say, as a matter of law, that

---

\* Affirmed by the Circuit Court in the case of *In Re Opal Howard*, 15 C.(N.S.), 171.

the acts charged against these persons, of which they have been convicted and sentenced, constitute such conduct.

Writs allowed and prisoners discharged.

### **RELATED DEMAND FOR AN ACCOUNTING FROM THE REPRESENTATIVE OF A TRUSTEE.**

Common Pleas Court of Hamilton County.

KATE ROBSON ET AL. v. FANNIE R. EVANS ET AL.

Decided May 28, 1912.

*Trust—Terminated by Death of Trustee—Statute of Limitations and Other Restrictions—Run Against Claims Not Filed with Representative of the Trustee.*

A trust is terminated by the death of the trustee, and the relation of debtor and creditor thereupon arises, and where the beneficiaries under the trust neglect to demand an accounting by the representative of the trustee, or to file their claims with him, the statute of limitations runs against them and all the restrictions which apply to the filing of claims against the estate of a decedent also obtained against them.

*Herman P. Goebel*, for the demurrer, cited: *Rozier v. Griffith*, 31 Mo., 174; *In re Negel's Estate*, 52 Pa., 154; *Holloway v. Holloway*, 97 Mo., 640; *Reyborn v. Mitchell*, 106 Mo., 366; *Cravens v. Kitts*, 64 Ind., 587; Vol. 10 Ency. Digest O. Rep., 605; *Delaney v. Carl*, 11 C. D., 1; *Perry v. Richardson*, 27 O. S., 110; *Conrad v. Conrad*, 38 O. S., 467; *Patten v. Patten*, 39 O. S., 590; *English v. Moneypenny*, 3 C. D., 582; *Clarke v. Lindsay*, 47 O. S., 442; *Taher v. Buckeye Supply Co.*, 7 N. P., 420; *Converse v. Terrell*, 2 W. L. J., 501; *Star v. Star*, 1 O. S., 329; *Gill v. Fletcher*, 74 O. S., 305; *Jung v. Heffner*, 36 O. S., 232; *Farmers Bank v. Wallace*, 45 O. S., 165; *Hogg v. Beerman*, 41 O. S., 99; *Freeman on Co-tenancy*, Section 230; *Wood on Limitations*, pp. 620, 586, 574, 576; *Wilson v. Wilson*, 11 C.C.(N. S.), 450; *Bonnell v. Brown*, 11 C.C.(N.S.), 58; *Kuester v. Yoe-man*, 14 C.C.(N.S.), 264; *Wood on Limitations*, p. 466; *Carpen-*

1912.]

Robson v. Evans.

ter v. Canal Co., 35 O. S., 307; Bettman v. Hunt, 12 W. L. B., 386; Hyatt v. Longworth, 27 O. S., 129.

*Bettinger, Guckenberger, Schmitt & Kreis*, contra, cited: General Code, Sections 10876, 10717-10745, 10746, 10748, 10878, 11238, 11222 and 11227; *Arbaugh v. Mellett*, 5 C. C., 295, at 297; *Hall v. Burnstead*, 20 Pick. (Mass.), 2 and 3; *Pratt v. Lamson*, 128 Mass., 528, at 529; *Bassett v. Drew*, 176 Mass., 141; *Cin'ti, Richmond & Ft. Wayne R. R. Co. v. Heaston*, 43 Ind., 172; *Rinard v. West*, 92 Ind., 359, at 365; *Clevenger v. Matthews*, 165 Ind., 689, at 692; *Woods v. Ely*, 7 So. Dak., 471; *Favorite v. Booher's admr.*, 17 O. S., 548, at 553; 25 Cyc., 1168; *Stewart v. Welch*, 41 O. S., 483; *Clark v. Boorman's Exrs.*, 18 Wall., 493; *Lease v. Downey*, 5 C. C., 480-483 and 485; *Jones v. Jones*, 18 C. C., 260; *Miller v. Parkhurst*, 9 N. Y. St. Rep., 759.

DICKSON, J.

Heard on demurrer.

William Robson, of Kentucky, died in May, 1880, leaving property both in Ohio and in Kentucky. His will was duly probated in Kentucky and its copy duly filed in the Probate Court of Hamilton County, Ohio. After certain bequests, his entire estate was given to his five children and one grandchild. One of these children, Charles Robson, by agreement, managed his father's estate until his own death in October, 1897, nearly seventeen years. Charles Robson gave by will all his property to his widow for life and in remainder to his children. Included in this property thus devised was his share of his father's estate. Kate Robson, his widow, and their surviving children have filed herein their petition in partition. The defendants have filed herein their answer and cross-petition asking also for a partition, and in addition thereto asking for an accounting—asking that the heirs of Charles Robson give an account of his management of the estate of William Robson, because neither did Charles Robson in his lifetime fully account, nor did his personal representative. This account is asked against the heirs of Charles Robson because they received by his will a part of the estate of William Robson, claiming that unless such an accounting now be had, that the heirs and legatees of Charles

Robson will have and thus keep a portion of William Robson's estate which belongs to them, the defendants.

Plaintiffs, answering, deny that Charles Robson failed to account—affirmatively state that he did account, and that also after his death, his personal representative accounted and that now and for a long time past, the estate of Charles Robson has been truthfully and duly closed.

Plaintiffs further claim that with the death of Charles Robson the trust in him terminated and that when the personal representative of Charles Robson closed her account, all the rights of the defendants herein for an accounting ended, that immediately at the death of Charles Robson the relations of debtor and creditor arose.

Plaintiffs further claim that the demand for an accounting is barred by the statutes of limitations, both the six year and the ten year limitations.

The defendants demur to certain of the claims of the plaintiff in their answer and cross-petition, because they do not state a valid defense.

The claim of the defendants in substance is that the estate of Charles Robson has never been closed—that the trust in him still exists; in effect that a trust exists until a settlement be made by payment.

The court is of the opinion that the trust in Charles Robson terminated at his death; that then the relations of debtor and creditor arose; that his personal representative had a right and it was her duty to render an accounting—that it was her duty to close the estate and make final distribution thereof.

Each and every one of the beneficiaries under that trust had a right to demand an accounting—had a right to file claims; and it was the duty of each and every one of those beneficiaries to demand an accounting, and to file their claims—to demand that the personal representative of Charles Robson render to them an account and close this estate. If these beneficiaries neglected their duties in the premises, all the limitations of the law obtain—limitations and restrictions as to filing claims against a decedent's estate and the statutes of limitations.

The demurrer will be overruled.

1912.]

Williams v. Haller et al.

**ESTATES TAIL AND FOR LIFE.**

Common Pleas Court of Hamilton County.

CHARLES C. WILLIAMS V. JENNIE M. HALLER, AN IMBECILE, ET AL.

Decided, May 1, 1912.

*Wills—Construction of a Devise and “to the Heirs of Her Body in Fee”  
—Rule in Shelley’s Case—Partition Proceedings Not Subject to At-  
tack by the Parties Thereto or Their Privies—Purchaser at Parti-  
tion a Grantee of the Parties—Title—Estoppel—Rights of Mort-  
gagee as Against Parties to the Mortgage Who Were Without Title.*

1. A devise of real estate in Ohio, to A. C., “for the term of her natural life, and at her decease to go to the heirs of her body in fee,” made by a resident of Ohio, after 1840 does not create an estate tail in A. C., but vests in A. C. an estate for life, with remainder to the issue of her body. The rule in Shelley’s case can not be applied to declare such a devise an estate tail.
2. The rule in Shelley’s case is a rule of property and not a rule of construction to be applied in the determination of the meaning of language in a grant or devise; and since the abolition of this rule in Ohio, as to wills, in 1840, it can not be invoked either as a rule of property or construction, to determine the character of the estate devised.
3. A decree or judgment in partition proceedings, finding the interest and title of the parties thereto can not be attacked or questioned in a subsequent action or proceeding instituted by any of the parties to the former proceeding or their privies, so long as the judgment or decree in the former action remains unreversed and in full force.
4. A deed in partition proceedings made by the sheriff in pursuance of a decree of the court, where all of the parties are duly and legally served with process or enter their appearance or answer to the merits, is the deed of the parties to the proceedings; and a purchaser under such a deed is to be regarded as the grantee of the parties to the partition proceedings. The transfer to the purchaser, in such a case, operates as a complete extinguishment of the title and interests of the parties to the partition proceedings.
5. Where persons, who do not have title to real estate, join in a mortgage to secure the payment of their own debt or the debt of any one of them, and in such mortgage warrant their title, by covenants of

general warranty, such a covenant is one that adheres to the land, runs with it, and is transmitted with the estate whether the same passes by descent or purchase. Such persons are subsequently estopped, by their mortgage deed, as between them and the mortgagee and those who acquire title to the land through the mortgagee or his interest in the land, from setting up their want of title at the time the mortgage was executed.

6. A party who voluntarily takes the benefits of a judgment or decree in a partition proceeding will not be permitted in a subsequent action or proceeding to question the validity of the proceeding, findings or judgment. He is concluded and estopped by the former judgment or decree.

*John Nichols and Wm. C. Lambert, for plaintiff.*

*E. P. Bradstreet and H. D. Peck, contra.*

GORMAN, J.

Decision on demurrers to amended answer and second amended answer.

This is an action in ejectment to recover specific real property under Sections 11901 and 11903, General Code (5779-5781, R. S.). The petition in substance alleges for a cause of action that plaintiff has a legal right to and is seized in fee simple of an undivided one-third part of the real estate described in the petition under the provisions of the last will of Peter McNicoll, who died April 21, 1852, and whose said will was admitted to probate and record on April 21, 1852, by the Probate Court of Hamilton County, Ohio; that by the fifth item of said will the testator devised to his daughter, Amanda Chamberlain (then Amanda Williams), mother of plaintiff and of the defendants, George J. Chamberlain and Ida M. Schuck (*nee Chamberlain, for the term of her natural life and at her decease to go to the heirs of her body in fee*, the property described in the petition, being part of in-lot No. 110 on the original plat of the city of Cincinnati on the west side of Main street, known as No. 309 Main street, Cincinnati, Ohio. The petition further avers that said will of Peter McNicoll is in full force and effect; that Amanda Chamberlain died May 5, 1911, leaving as *the sole heirs of her body* the plaintiff and the defendants, George J. Chamberlain and Ida M. Schuck, who are tenants in com-

1912.]

Williams v. Haller et al.

mon each owning one-third of said premises; that, by the eighth item of said will, the testator provided that:

“Should any of my children or grand-children, to whom I have made devises of real estate herein, die without children or grand-children living at their decease, it is then my will that the real estate so devised to them shall revert to and become the property of my heirs at law.”

The petition further avers that the defendant, Jennie M. Haller, is an imbecile and the widow and sole devisee of John Haller, deceased; that the defendant, Edward Rockel, is her duly appointed guardian; that said Jennie M. Haller and her said guardian unlawfully keep plaintiff and his co-tenants out of possession of said premises and have so done since May 5, 1911, the date of death of Amanda Chamberlain, and have excluded them from the rents, issues and profits thereof. Plaintiff prays for judgment and restitution of the property, and for an accounting for the rents, issues and profits, and further for a partition of the premises as against his co-tenants.

The defendant, Edward Rockel, as guardian of the imbecile, Jennie M. Haller, has by his amended and second amended answer to plaintiff's petition set up, after denying certain averments, the following defenses to plaintiff's action.

First, he says that on February 4, 1891, Ida M. Chamberlain (now Ida M. Schuck), defendant herein, filed her petition in case No. 45359 in the Superior Court of Cincinnati for partition against the plaintiff, Charles C. Williams, Perry H. Williams (now deceased since March, 1911), George J. Chamberlain and Henry Rostert, alleging therein that she owned an undivided one-fourth of the real estate described in the petition herein, in fee simple, and also owned the life estate of her mother, Amanda Chamberlain, and that plaintiff in this action, Charles C. Williams, Perry H. Williams and George J. Chamberlain each owned an undivided one-fourth interest therein, subject to the life estate of Amanda Chamberlain, the mother, who was the same person described in the petition herein as having died May 5, 1911; that all of said parties to said action, including plaintiff, Charles C. Williams, were duly

served and brought into said case No. 45359, Superior Court of Cincinnati, and that on the 27th day of October, 1891, the court in said cause entered a decree and judgment therein finding that all of said parties had been duly and legally served, and that the allegations of the petition were true and that said real estate was owned by the said parties in fee simple, each having a one-fourth interest therein subject to the life estate of their mother, Amanda Chamberlain, therein, and that they were tenants in common and entitled to partition, and did order said premises to be duly partitioned by three commissioners appointed for that purpose under the direction of the sheriff of Hamilton county, Ohio; that partition could not be made without manifest injury to the premises and the same were returned appraised by said commissioners at their true value in money, and that thereupon the court confirmed said return and appraisal and ordered the sheriff to advertise and sell said property at public sale, free from the life estate of Amanda Chamberlain, none of the parties having elected to take said premises at the appraised value; that thereafter in pursuance of said order of sale, after having advertised the said property for thirty days, according to law, and the orders of the court, the said sheriff did on December 3, 1911, sell the said premises at public sale in fee simple and free from the life estate of Amanda Chamberlain to John Haller, the highest and best bidder, for the sum of \$5,200, said sum being more than two-thirds of the appraised value thereof; that afterwards, at the December term, 1891, of said court, after full consideration, the said court approved and confirmed said sale and the proceedings of said sheriff and ordered said sheriff to make and deliver to said John Haller a proper deed for said property in fee simple and free from the life estate of said Amanda Chamberlain therein, all of which was accordingly done by the said sheriff, who executed and delivered to said John Haller his sheriff's deed in due form of law for said premises free from all the interest and claims of each and all the parties to said cause, of whom the plaintiff herein was one; and the said deed was duly recorded in the office of the recorder of Hamilton county, Ohio,



1912.]

Williams v. Haller et al.

on March 3, 1892, in deed book 727, page 294. The defendant further avers that by reason of said proceedings and purchase, said John Haller became the owner in fee simple of said premises described in the petition herein, and in said petition in partition, and that Jennie M. Haller, as his sole devisee and heir at law, is now the sole owner in fee simple of said premises; that all the interest of plaintiff, Charles C. Williams, in said premises was divested by virtue of said proceedings in the Superior Court of Cincinnati, and since the execution and delivery to John Haller of said sheriff's deed, and that the same passed thereby to said John Haller, his heirs and assigns forever.

The defendant further averred in his answer that prior to the commencement of said partition suit, to-wit, on March 30, 1885, said Amanda Chamberlain and her four living children, Charles C. Williams, plaintiff, Ida M. Chamberlain (now Schuck), Perry H. Williams and George J. Chamberlain, and three of the parties to this action, executed and delivered to one Frank Bruner their mortgage deed for the said property herein, and in the will of Peter McNicoll, deceased, described and thereby conveyed the same and all their right, title and interest therein, with covenants of general warranty, to said Bruner, covenanting further for themselves, their heirs and assigns, that they were the true and lawful owners of said premises and had full power to convey the same, and that the title to said premises was clear, free and unencumbered and that they would warrant and defend the same against the claim or claims of all persons whomsoever; that said mortgage was given to secure a note and debt of all of said parties for \$1,000, with interest at 8 per cent. per annum, and was duly acknowledged and recorded as required by law on April 2, 1885, in the office of the recorder of Hamilton county, Ohio.

The defendant further avers and sets up that afterwards, on June 28, 1888, all of said parties, Amanda Chamberlain and all her children, executed and delivered to one Louis J. Dolle, their certain second mortgage deed for said premises to secure their joint note and debt for \$1,000, and containing all the covenants and warranties contained in the said mortgage to said Bruner;

that said mortgage was in regular and due form with covenants of ownership in fee simple and general warranty, and the same was duly recorded as provided by law in the office of the recorder of Hamilton county, Ohio, on June 22, 1888.

Defendant further avers that both of said mortgages were sold and assigned to one Henry Rostert, who was made a party defendant in said partition suit, cause No. 45359, Superior Court of Cincinnati, Ohio, and that he filed his answer and cross-petition therein setting up both of said mortgages and the notes secured thereby, and praying for the payment of the same out of the proceeds of the sale of said partition premises; that the court on final decree of distribution found said notes and mortgages to be valid and subsisting liens on said real estate, and ordered to be paid to said Rostert out of the proceeds of the sale of said partitioned real estate the sum of \$2,255.30, the amount due and unpaid on said notes and mortgages.

Defendant avers further that by reason of said covenants of seizin and warranty in said mortgage deeds and the declarations of plaintiff and his co-defendants in said conveyances, and also because plaintiff's said debts secured by said mortgages were paid directly out of the proceeds of the said of said property, plaintiff is now estopped to prosecute this action to recover said real estate from this defendant or to assert any interest therein.

The defendant for a further defense says that on February 2, 1891, Amanda Chamberlain for the consideration of \$2,400 sold and conveyed to her daughter, Ida M. Chamberlain (now Schuck), plaintiff in said cause No. 45359, Superior Court of Cincinnati, and now a defendant herein, her entire life estate in the property which is the subject-matter of this action, and the deed therefor is recorded in deed book 706, page 325, of the deed records of Hamilton county, Ohio, and that at the time of the commencement of said partition suit in the Superior Court of Cincinnati said Ida M. Schuck (nee Chamberlain) was the owner thereof as well as of her one-fourth part as devisee under the will of Peter McNicoll, and was also said owner when the sheriff's sale thereof was made to John Haller as above set forth.

1912.]

Williams v. Haller et al.

Defendant further says that after the sale to said Haller as aforesaid, the plaintiff, Charles C. Williams, together with his sister, Ida M. Chamberlain, and his brother, Perry H. Williams, and George Chamberlain, each for himself received from the sheriff of Hamilton county, Ohio, and receipted to him therefor, the respective sums of money found due them by the court and ordered to be paid to them by said court out of the balance of the proceeds of said sale of said real estate now sought to be recovered herein; and that by reason of said facts, plaintiff and defendants, George J. Chamberlain and Ida M. Schuck, are barred and estopped from asserting any claim or interest in and to the said real estate, or from recovering the same from said Jennie Haller.

Defendant further avers in his second amended answer that more than ten years have elapsed since the execution and delivery of said sheriff's deed to John Haller, under and through whom said Jennie M. Haller holds title, and before the commencement of this action; that said John Haller took possession of said premises immediately upon the receipt of said sheriff's deed and under the same, and that he and his assigns, including said Jennie M. Haller, have ever since held and enjoyed said premises under said deed and title without interruption, and the plaintiff has never taken any steps to have said deed reformed, canceled or modified, and it still remains the same as when delivered to said Haller, and that by reason thereof plaintiff's cause of action is barred by the statute of limitations. Section 11227, General Code.

Defendant prays that the petition may be dismissed and that Jennie M. Haller's title be quieted against plaintiff and against Ida M. Schuck and George J. Chamberlain, and that said Jennie M. Haller be adjudged the sole owner of said premises.

The defendant, George J. Chamberlain, answers, admitting all the allegations of the petition and joining in the prayer thereof. The defendant, Ida M. Schuck, enters her appearance, but has not yet filed her answer.

The plaintiff has demurred to the fourth, fifth, sixth, seventh and eighth defenses set up in the amended answer of Ed-

ward Rockel, guardian, and to the second amended answer of said defendant, on the ground that on their face these defenses are insufficient in law.

The demurrers search the record and, therefore, in determining whether or not the defendant has presented one or more good defenses to the plaintiff's action, the court may and should also examine the averments of the petition in connection with those of the answers, to ascertain whether or not on all the facts presented by the pleadings preceding the demurrers the action can be maintained.

The first inquiry is: what estate, title or interest passed to the plaintiff and his mother, Amanda Chamberlain, and the plaintiff's brothers and sister by the will of Peter McNicoll, deceased? The correct answer to this question will probably determine whether or not the plaintiff has now a good cause of action against the defendant, Jennie M. Haller, and her guardian.

It is claimed by plaintiff's counsel that the estate created and vested in Amanda Chamberlain was an estate tail. The language necessary to create an estate tail at common law before the promulgation of the rule in Shelley's case, was "*to A and the heirs of his body*," or such like words. The first taker was called the first donee in tail, and held the particular estate which endured for the life of the first donee in tail and no longer. The fee was vested in the first donee in tail by virtue of the grant or devise, and passed to his issue or the heirs of his body as an estate of inheritance upon the death of the first donee in tail. The issue did not take *by purchase from the donor*, grantor or devisor as the case might be. The difference between this kind of a fee and a fee simple is that it can not be aliened and is restricted in its course of descent at law *to certain heirs—those of the body*. See *Blackstone Lib.* II, \*pp. 110 to 119 inclusive; *Preston on Estates*, Vol. 1, pp. 355 to 555 inclusive.

The incidents to a tenancy in tail were chiefly that he might commit *waste*; the wife had *dower* therein; the husband had *curtesy* of the estate tail; and the estate might be *barred*

1912.]

Williams v. Haller et al.

or destroyed *by a fine, by common recovery or by lineal warranty* descending with assets to the heir. *Blackstone*, Book 2, p. 116.

A life estate has none of these incidents and although a life estate may be of identically the same endurance as the particular estate held by the first donee in tail, nevertheless, there is a wide difference in the characters of a life estate and a particular estate in tail, or the estate of the first donee in tail. When a life estate has been carved out and granted or devised to one, the remainder does not pass to those who take it *as an estate of inheritance from and through the life tenant*, but the remaindermen take *from the grantor or devisor directly* as an estate *by purchase* upon the death of the life tenant. *The fee is vested in the remainderman*, and not in the life tenant, whereas as heretofore pointed out, the fee in an estate tail is vested by the grant or devise in the first taker, the first donee in tail, and passes *from him* at death by *operation of law to the immediate heirs* of his body. In case of a life estate the life tenant can not commit waste without forfeiting his estate; the wife has no dower in such an estate; the husband has no curtesy therein; the estate can not be barred by fine or a common recovery.

Now the language of Peter McNicoll's will in item 5, which carries the title to the property under consideration, is as follows:

"I give and *devise to my daughter, Amanda Williams (Chamberlain for the term of her natural life, and at her decease to the heirs of her body in fee*, the following lot of land," etc. (describing the premises set forth in the petition.

This language *does not* create an estate tail by will; it is not to "Amanda Williams and the heirs of her body," but to her *for life*, and at her death to the heirs of her body. She has only a life estate with remainder to the heirs of her body.

By the application of the rule in Shelley's case this language will be construed to create an estate tail. This is a rule of property and not a rule of construction to be applied in the determination of the meaning of the language of a grant or devise. It is usually stated thus:

“Where a freehold is limited for life, and by the same instrument which creates the life estate, the inheritance is limited, either mediately or immediately, to *his heirs or to the heirs of his body, the first taker takes the whole estate*, either in fee simple, or in fee tail; and the words, ‘heirs’ or ‘heirs of his body’ are *words of limitation, and not of purchase.*” *King v. King*, 12 Ohio, 390-471.

But the rule in Shelley’s case was abolished by the Legislature of this state, *in its application to wills, in 1840*, twelve years before the probating of Peter McNicoll’s will—Swan’s Statutes, 999, Section 47 (now Section 10578, General Code), which reads as follows:

“When lands, tenements, or hereditaments are given *by will to a person for life*, and after his death to *his heirs in fee*, or words to that effect, the conveyance shall vest an estate *for life only* in such first taker and a remainder *in fee simple in his heirs.*”

Now the first and most important rule of construction as applied to wills, is to take up the will by its four corners and endeavor to ascertain from an examination of all its parts and the conditions existing at the time of its execution, and the circumstances surrounding the making of the will and present to the testator at that time, the intention of the testator.

Plaintiff’s counsel bottom their right to a recovery in this action on the proposition that the estate devised to Amanda Williams (Chamberlain) is an estate tail, and numerous authorities are cited in support of their contention that such is its character; and that therefore the plaintiff and his brothers and sisters had no right, title or interest in the property devised by Peter McNicoll at the time of the partition suit in 1891, in the Superior Court of Cincinnati, and as a consequence nothing passed to John Haller, the purchaser, except the interest of Amanda, which endured no longer than her life and died with her; and they further claim that plaintiff is not estopped either by the record of the Superior Court case and the sheriff’s deed to Haller, or by any act of plaintiff in accepting and receipting for his distributive share of the proceeds of the sale

1912.]

Williams v. Haller et al.

to the sheriff, and standing by and permitting Haller innocently to purchase the property and pay over his money to plaintiff and his co-tenants.

Counsel for plaintiff in their oral arguments and in their briefs, have assumed and asserted that the estate which passed to Amanda and her children by this will was an estate tail, and this claim appeared to be acquiesced in by defendant's counsel; at least, there was no denial on their part of plaintiff's claim, in the oral argument. Upon the court's suggestion to counsel for plaintiff that the estate might not be entailed, plaintiff's counsel in their supplemental brief have cited the case of *King v. Beck*, 12 Ohio, 390, where the language used was almost identical with that employed by Peter McNicoll in the devise to Amanda, and point out that the Supreme Court in this case held that:

“A devise to A *for life*, and after his decease *to the heirs of his body*, and *failing heirs at his decease, then over*, is an estate tail.”

Now there is no doubt in the mind of the court that the *fifth item* of Peter McNicoll's will taken in connection with the *the eighth item*, created the identical kind of an estate as the one in the case just cited, even to the *devise over*, for by the *eighth item* of McNicoll's will it is provided that on failure of *children or grandchildren of Amanda, living at her decease* there shall be a devise over to the heirs generally of Peter McNicoll.

But the case of *King v. Beck*, *supra*, was overruled by the Supreme Court on rehearing of the case, as appears in the later case of *King v. Beck*, 15 Ohio, 559; and upon a reversal the court there held that applying the rule in Shelley's case the estate was not an estate tail, because such a construction would defeat the manifest intention of the testator to devise a life estate only to the first taker. The former decision was squarely reversed and counsel no doubt overlooked this fact, or the case would not have been cited in support of their claim. Furthermore, it could not be an authority in support of the claim that



the estate involved in the case at bar is an estate tail, because that case, *King v. Beck*, arose before the rule in Shelley's case as to wills was abolished—before 1840—and it was then proper and the duty of the court to apply that rule; but in the case at bar we are precluded from applying the rule in Shelley's case even if its application would lead conclusively to the opinion that this is an estate tail. While this *King v. Beck* case was decided first *in banc* in 1843, a reference to the cases alluding to it will establish the fact that the rule in Shelley's case was applied only because the will was probated prior to 1840. See *Halley v. Hengstler*, 23 C. C., 504; *King v. Beck*, 12 Ohio, 390, second paragraph of opinion by Lane, J.; *King v. Beck*, 15 Ohio, 561-563; *Armstrong v. Zane*, 12 Ohio, 287-290; *Brockschmidt v. Archer*, 64 O. S., 502-514; *McDaniels v. Hays*, 6 C.C. (N.S.) 257.

So that if the case of *King v. Beck* is to be considered an authority as finally decided in 15 Ohio Reports, *supra*, it is an authority most strongly against plaintiff's claim that we are here dealing with an estate tail.

Now let us examine the other authorities cited by plaintiff's counsel to see if they are cases of estates tail without the application of the rule in Shelley's case; because, as has been pointed out, if the language employed does not create an estate tail in any of these cases, such case can not now be considered an authority in determining the nature of the estate devised to Amanda and the heirs of her body. These cases cited must stand, without the aid of the rule in Shelley's case, as an estate tail, in order to warrant the conclusion of the court found in each. We shall now show that these cases are all cases of *fee tail* and that in no one of them was the rule in Shelley's case applied, as must be done in the case at bar, to warrant us in concluding that we have before us a fee tail estate.

*Kline v. Dungan*, 81 O. S., 371, cited. The language creating the estate was as follows: "*To Elizabeth Wilson and the heirs of her body.*"

A fee tail pure and simple. No need here of applying the rule in Shelley's case. No life estate is granted to Elizabeth Wilson, but an estate in fee tail.



1912.]

Williams v. Haller et al.

*Riddings v. Chaney et al*, unreported case, 81 O. S., 566, cited. From the facts set out in the record submitted to the court and in plaintiff's brief we find the following language employed to create the estate devised: \* \* \* "that amount it is my will, *shall go to the said Hester and the heirs of her body*, the residue to go to the said Edward Chaney."

This is an estate tail by the very words employed; there is no life estate carved out, and there could be no application here of the rule in Shelley's case.

*Carter v. Grossnickle*, No. 326 C. C., Clermont county, and No. 327 same court; opinion of Common Pleas Court, 11 N.P. (N.S.), 465, cited. The language of the devise in this case was as follows: "To Hannah Carter and *the heirs of her body*, 110 acres of land," etc.

This is clearly an estate tail by the express words and not by the application of the rule in Shelley's case, and we are not aided by the decision of the learned court in this case, in solving the problem before us.

We have not examined the cases cited by the plaintiff from other states and the federal courts, because the rule in Shelley's case may be in full force in those jurisdictions, and if it is these decisions would not aid us. If the rule as to wills was not in force in these jurisdictions where these cases arose, then we venture to say that the cases will all be found to rest upon the fact that an estate tail was created in each case *by the express words employed* without the application of the rule in Shelley's case.

*Elrod v. Bass*, 1 C. C., 38, has been cited, but the court in that case was not dealing with a fee tail, but with a life estate to Cynthia Elrod, remainder to her heirs. If the rule in Shelley's case could have been applied—as it could not—this would have vested in Cythia Elrod a fee simple estate, but the court did not and could not apply it, but held that according to the intention of the testator, the heirs took the remainder, and inas much as the heirs could not be determined during the life of Cynthia Elrod, no partition could be adjudged during her life *without the consent of all of the remaindermen or reversioners*.

This case does not assist the court, because the partition case in the superior court, among Amanda's heirs was consented to by all the parties except plaintiff, and not objected to by him, although he was a party defendant, was served personally and had a copy of the petition served upon him, thereby having full notice of the nature of the case and the prayer of the petitioner.

Other cases alluded to by counsel for plaintiff and cited in some of the decisions commented upon by plaintiff's counsel on the question of an estate in fee tail are the following: *Pollock v. Speidel*, 17 O. S., 440, and the same case, 27 O. S., 86.

The language of the *grant* creating the estate in the Pollock cases—for the estate was created there, by deed—was: “To the said James Pollock, the *heirs of his body* and assigns forever”—a clear estate tail by the words of the grant. Furthermore, the rule in Shelley's case would apply here, because the estate was not created by will, and it is abolished *only as to wills*. The only value these cases have for us in their application to the case at bar, is to note the nature of an estate tail, as defined by the courts therein.

In the case of *Harkness v. Corning*, 24 O. S., 416, it was held that the words, “To my granddaughter, Sarah Harkness, daughter of Charles Harkness and her issue” in a will were the equivalent of to my granddaughter, etc., and the heirs of her body, and that an estate tail was thereby created.

This conclusion is undoubtedly sound law, and it squares with the rule of the common law in holding that “*issue of the body*” is a phrase synonymous with “heirs of the body.”

No case will be found in Ohio since the abrogation of the rule in Shelley's case as applied to wills, which holds that a devise which carves out a life estate and devises the remainder to heirs, or heirs of the body, or any such similar language, can be construed to create a fee simple or a fee tail in the tenant for life, the first taker.

What then is the nature of the estate devised to Amanda Williams and the heirs of her body by the will of Peter McNicoll?

Taking up the whole will by its four corners and examining all the provisions thereof to ascertain the testator's intention,

1912.]

Williams v. Haller et al.

we note that by the eighth item of the will the testator declares what shall become of the devises in the contingency of the failure of children, or grandchildren of any of the devisees. Now he made devises to several of his children and to *two of his grandchildren*, Virginia and Sarah Howell, and the language in each and every devise is the same; *to the devisee, for the term of her natural life and at her decease to go to the heirs of her body.*"

By the eighth item of the will he provides that:

"Should any of my *children or grandchildren* (the two classes named in the will) to whom I have made devises of real estate herein die without *children or grandchildren living at their decease*, it is then my will that the real estate so devised to them shall revert to and become the property of my heirs at law."

Applying this provision to Amanda, and her devise of the Main street realty, it must be manifest that in the event of Amanda dying, without leaving, *living at her death*, children or grandchildren, *then there is devise over to the heirs* generally of the testator. The remainder after the termination of the life estate of Amanda by the fifth item of the will would go in an indefinite course to the heirs of her body; but when we give effect to the provisions of the eighth item of the will—as we are bound to under the first essential canon of construction as applied to wills—it will be seen that the remainder is limited to the children and grandchildren of Amanda, and in default or on failure of children or grandchildren, then over to the heirs generally of the testator. This limitation is inconsistent with the nature and character of an estate tail, general, which must contain no limitation as to duration of time or of the heirs of the body of the first donee in tail. So that, considering the case from this viewpoint, it appears certain that even with the aid of the rule in Shelley's case, if this rule could be invoked, the claim of plaintiff that the devise is an estate tail, must fail.

The court is of the opinion that when all the parts of the will which shed light on the testator's intentions are considered, it will be found that this devise is an estate *for life to Amanda*, with a *vested remainder in fee* to her *children and grandchil-*

*dren*, subject to be divested by the death of any *child or grandchild* before the decease of the life tenant, Amanda. The enjoyment and possession of the remaindermen is postponed until Amanda's death. There can be no doubt that the testator intended to give a life estate to Amanda and no more. He says so, in express unequivocal language. It is also manifest that the testator's intention was that after her death the property should go to her children, or if they should all *then* be dead, it should go to her then living grandchildren. This is clear from the eighth item of the will. But if her children and grandchildren have all died before Amanda, and there were great grandchildren then living, they would not take the estate except as heirs generally of Peter McNicoll, because in that contingency the devise over is to his *heirs at law*. Bearing in mind the provisions of the eighth item of the will, the persons to whom the estate was to go on the death of Amanda, was not to the heirs of her body unlimited, but to a *limited line* of the heirs of her body, to the children and grandchildren only. The succession was to stop there, and in default of children or grandchildren living at Amanda's death, the succession was to be diverted from the line of the *heirs of her body* to the *heirs generally of the testator*. Amanda's great-grandchildren were cut off by the devise over, and they would take nothing of this estate, unless and except, as heirs generally, *not of Amanda, but of the testator, Peter McNicoll*.

The language of the testator in the fifth and eighth items of the will clearly indicate that the persons who are to take the estate in remainder after Amanda's death, were to take *by purchase from the testator and not by descent* from Amanda, the life tenant. The testator created a remainder by purchase in the children and grandchildren of Amanda and by the devise over, in his *heirs at law*. The words, *heirs of her body*, in the fifth item of the will, when considered in connection with the language of the eighth item, were used as *descriptio personarum*, meaning children and grandchildren, who should take the remainder by purchase *from the testator*, and not by descent from Amanda. *Bunnell v. Evans*, 26 O. S., 409.

.1912.]

Williams v. Haller et al.

We think this conclusion is fully sustained by the following authorities:

*Halley v. Hengstler*, 23 C. C., 504-509, where the court says:

“It is true, as said by counsel for plaintiffs, if the will provided that after the death of John and Nathaniel, the land should go to certain named persons, or even if a person or class of persons were designated, as ‘*children*,’ ‘*grandchildren*,’ ‘*issue*,’ of the like, it would carry no more than life estate to John and Nathaniel with remainder to such persons or class, etc.

“As pointed out, there is a wide difference where use is made of the *general collective* term heirs, signifying all who might inherit from the first taker, *ad infinitum*.”

Could language be more adaptable to the case at bar than this? See, also, *Foster v. Wick*, 17 Ohio, 250; *Jeffries v. Lampson*, 10 O. S., 102-104, where the court says:

“We are of the opinion that by this language, a remainder in fee (after the determination of the life estate of the mother) was vested immediately in William and Henry (sons of the life tenant) in equal moities of the premises in common; such vested remainder, however, being subject to be divested upon the contingency expressed, to-wit: the death of either during the life of the mother (the life tenant).”

*Taylor v. Foster*, 17 O. S., 166; *Collins v. Collins*, 40 O. S., 354. This was a case where the testator devised a life estate to his wife and then provided:

“At the death of my said wife the real estate aforesaid \* \*  
\* I give and devise to my two sons, Silias and William Collins and their *heirs*. If, however, either of said sons should die leaving *no children* at their decease, then the share of said property above devised to such son is to go into the possession of the surviving son. If in case both of my sons \* \* \* should die leaving no heirs, then the property above described to be equally divided among my heirs. \* \* \* *Held*: That by the will the sons, Silas and William, each took a vested remainder in fee simple in one undivided half of the lands, *defeasible* upon the contingency of the death of either leaving no children at his decease, and leaving the other brother to survive him.”

In this case it was contended as in the case at bar, that the testator intended to create an estate tail and that the children of Silas Collins inherited the fee in the premises set off to William by partition, should he die leaving no children. But the court held otherwise, as above set forth.

See also, *Poor v. Hart*, 11 N.P.(N.S.), 49, a strong decision by Judge Swing, affirmed by the Supreme Court.

The case, *Taylor v. Taylor*, 63 Pa. St., 481-488, is a case very much like the one at bar, providing for a devise over in case of the death of a daughter leaving no issue, before the death of her mother, the life tenant, the issue to take the daughter's share, if there should be any, and if none, then to the children of the testator's wife's sister. *Held*: That the children took a remainder.

See also, *Peer, Excr., v. Hennion*, 77 N. J. L., 693; *Kemp v. Reinhard*, 228 Pa., 143.

In this case the court says in pointing out that the rule in Shelley's case can not apply, although it was in full force in Pennsylvania and not abrogated as to wills, as in Ohio:

"But what defeats the application of the rule in Shelley's case is the unmistakable intention of the testatrix, not only that Jacob was to get *only a life estate*, but that *after his death the remainder should not pass by devolution from him (Jacob) to his heirs, but directly from her (the testatrix) to a designated class or to a designated individual*. Her words are: 'After the decease of said Jacob E. Kemp, I give and devise the above described seven tracts or pieces of land devised to him herein for life to *his issue in fee*. Should he, however, die without leaving issue, I give and devise the same unto my son Pierce G. S. Kemp, his heirs and assigns forever.'"

Being of the opinion, therefore, that the children of Amanda Chamberlain took a vested fee simple in remainder, subject to be divested by the death, before that of Amanda, of any one or more of them without leaving *children* surviving them, the next inquiry is what was the effect of the partition suit in the Superior Court of Cincinnati upon the title to this property. Could the parties to that action maintain it, the life estate having been acquired by Ida M. Chamberlain, the daughter, by purchase

1912.]

Williams v. Haller et al.

from her mother, and she and her brothers owning each an undivided one-fourth interest therein in fee simple, in remainder, subject to be divested by the happening of the contingency of dying before the mother without children?

In *Bass v. Elrod*, 1 C. C., 38, it was decided that:

“If one of the remaindermen, or reversioner is also the owner of the life estate in the whole premises, he may maintain such an action (partition), and if his interest therein can be set off to him without injury to the value of the residue of the estate, it may be done. \* \* \* Nor ought there to be a sale of the premises subject to said life estate if it can not be divided *without such consent* (of the remaindermen). \* \* \* If the *owner of the life estate* agrees to the sale of the premises *free* of his life estate therein and consents to take the value thereof in money, to be fixed or ascertained by the court, we are of the opinion that such sale may be had if it appear to the court that it will not be to the prejudice of the other parties in interest.”

Is not this precisely what Ida Chamberlain and her brothers did in their partition case? She brought the action, asked to have the value of her life estate ascertained and allowed to her in money, and that the premises might be sold free from her life estate, and two of her brothers by answer admitted the allegations of her petition and joined in the prayer. The plaintiff did not answer or join in the prayer, but he was served personally with a summons and a *copy of the petition*, and apprised of the time to answer. He was in default for answer, made no objection to the partition or sale; acquiesced therein by silence, and took his proper share of the proceeds of the sale from the sheriff. Failing to object when he had the opportunity to do so, and if he wished to preserve his rights, should have done so, we think he has brought himself within the rule laid down in the case of *Bass v. Elrod*. The court, on page 40, in the fourth paragraph says:

“Nor is he now entitled to the partition (during the life of the tenant for life) of said second tract *against the objection of any one of the remaindermen*,” etc.

*Non constat* if no one of the remainder *objected*, could not partition have been maintained? The court believes it could have been.



It appears to the court that counsel for the parties in the partition case in the Superior Court of Cincinnati were familiar with this *Bass v. Elrod* case, and shaped their pleadings, proceedings and action to conform to the rules laid down therein,

The right to maintain a partition suit where the outstanding life estate has been brought in by one of the remaindermen by consent of parties, has been approved, confirmed and established in this state in the cases of *Morgan v. Staley*, 11 Ohio, 389; *Tabler v. Wiseman*, 2 O. S., 208; *Toledo Loan Co. v. Larkin*, 1 C.C. (N.S.), 473.

In view of these authorities and on reason, the court is of the opinion that all the right, title and interest of the parties to this partition suit in and to the property sold to Haller, passed to him by the sheriff's deed, and that Haller took a fee simple title to the property.

It might be sufficient to rest the decision of this case upon the grounds above set forth, but in addition to the reasons given why this action can not be maintained by plaintiff, it further appears by the defendant's answer that the plaintiff, even though he did not have a vested remainder in this property, is estopped to deny it by the record of the partition suit and by the record of the two mortgages given by him and his brothers and mother and sister, which mortgages contained covenants of general warranty that he and those joining with him were the owners in fee simple of the property, and these covenants *run with the land* and enure to the benefit of the purchaser thereof; and he is further estopped by his acts and conduct and may not in a collateral proceeding, such as this, attack the record of the partition suit, to which action he was a party; and he is bound and concluded by the record thereof.

Now the answer filed herein discloses that, in the partition suit in the superior court, to which plaintiff was a party and duly served with notice of the pendency and prayer of the petition, the court found and decreed that said real estate described in the petition in this cause, and the same property therein described and asked to be partitioned, was owned in *fee simple* by the parties to said cause, one-fourth thereof by the plaintiff.



1912.]

Williams v. Haller et al.

Said judgment and decree stand unreversed and unmodified, and plaintiff being a party thereto is bound and concluded by the decree, and estopped by the record thereof to deny the finding as to his title to the property. It was decided in *Hixon v. Ogg*, 53 O. S., 361, that where issue has been joined on a material fact in an action and the issue judicially determined and carried into judgment by a court having jurisdiction of the action, the *parties to such action* are concluded by such finding until the judgment is reversed or set aside. And the fact thus established can not be *retried* by the same parties in any subsequent action, whether the second action is upon the *same* or a *different* subject matter from the first.

See, also, *Covington & Cin'ti Bridge Co. v. Sargent*, 27 O. S., 233, where it was held that not only is the judgment conclusive and binding as to all matters that were litigated and determined, but it is also conclusive as to all matters which *should have been determined*; and further, that not only are the *parties* to the action bound and concluded, but their *privies* are also bound. If the subsequent action be the same as the first the parties and their privies are barred from maintaining the second action; but where the second action between the parties and their privies is upon a *different claim* or demand, the judgment in the prior action operates as an estoppel only, as to matters in issue or points controverted, upon the determination of which the finding was rendered. Now it can not be denied that it was necessary for the court to find in the partition case that plaintiff and his brothers and sister were the owners of the property in controversy and entitled to the immediate possession, as a predicate to a decree in partition.

See, also, *Cincinnati v. Emerson*, 57 O. S., 132; *Ewing v. McNair & Claffin*, 20 O. S., 15; *Swensen v. Cresop*, 28 O. S., 668, where it is said that it is a principle of general application that a party defending, is bound to set up all matters which are strictly matters of defense. He can not remain silent and afterwards set up a claim which he might and should have made in the action to which he was a party.

In *Herman on Estoppel*, Vol. 1, pp. 303 and 304, it is laid down as a rule that parties to a partition suit will be estopped

to deny the findings and decree, or the recitals of the pleadings where they have been duly served and have an opportunity to be heard; have had their day in court.

In *Wood v. Mather*, 38 Barb. (N. Y.), 473, it was held in a case similar to the one at bar, that:

“Where an adult co-tenant of lands joins in a petition for the sale thereof and such petition alleges that the legal title thereof is in an infant co-tenant, and a sale is made in pursuance of such petition, the order of sale will estop the adult from *questioning the title of the purchaser* of the lands at such sale.”

The deed in partition is made by the sheriff under an order of sale in partition and is the *act of the parties* themselves, and a purchaser at such sale is regarded as a *grantee*. The transfer to the purchaser is a *complete extinguishment of the title* of the parties to the action. *Herman on Estoppel*, Vol. 1, 304; *Pentz v. Kuester*, 41 Mo., 447; *O’Neal v. Duncan*, 4 McCord (S. C.), 246.

In the case above cited, *Pentz v. Kuester*, plaintiff leased to defendant the premises in dispute, for one year, and gave him possession. Before the expiration of the lease, all the interest of the plaintiff in the land was sold and conveyed to one Brecker under a decree in partition and order of sale, to which action plaintiff, the lessor, was a party claiming as tenant in common with other parties. The plaintiff afterwards brought this action in *forcible entry and detainer* against the lessee, who relied upon the sheriff’s deed and the record in partition and a new lease from the purchaser, Brecker, at the partition sale. *Held:*

“A judgment estops the parties to the suit and all persons claiming in privity with them. The deed made by the sheriff under the order of sale in the partition case is the act of the parties themselves, and the purchaser at such sale is to be treated as a grantee within the meaning of the statute.”

On page 450 the court says:

“The proceedings in partition were binding and conclusive upon all the parties to the record and upon those holding under them afterwards; and the plaintiff was estopped from denying

1912.]

Williams v. Haller et al.

that his title and right to possession had been extinguished by the transfer of both to the purchaser at the partition sale." Citing *Owsley v. Smith*, 14 Mo., 153; *Forster v. Davis*, 38 Mo., 115.

"It was a sale by the act of the parties themselves as well as by the judgment of the law, and not a sale *in invitum* like an ordinary sheriff's sale under execution. The partition was had upon the petition of the plaintiff, and the sheriff's deed in partition must stand upon the same footing here as if it had been a voluntary conveyance of the title by the plaintiff himself. The purchaser will be considered as a grantee within the meaning of the statute."

In *O'Neal v. McCord*, *supra*, it is held that:

"Where a tract of land was sold under execution by the sheriff, in an action against the defendant in trespass to try the titles, by the purchaser against the defendant, the defendant will not be permitted to give evidence that the title of the land was not in himself but in another whose tenant he was. The sheriff's title (being the organ of the law to convey the defendant's right) is considered as the deed of the defendant and operates as an estoppel."

The difference between the case at bar and the Chaney case is this: In that case there had been a judgment rendered on a note—no mortgage. The land and the title thereto were not drawn in question in the action to recover the judgment. The judgment creditor then levied upon the lands to satisfy his judgment. There was nothing in the record to show that the judgment debtors were the owners of the land, or that they claimed to be the owners. They were merely silent and allowed the sheriff to sell the property under the execution without seeking to prevent the sale—merely standing by. This was purely a proceeding *in invitum*, and not a voluntary proceeding as in the case at bar, where the initiative was taken by plaintiff's co-tenants and the property sold at the suit of the parties. It was only sought in the Chaney case to apply the rule of estoppel *in pais* or estoppel *by silence*, but if they had in that case undertaken to partition the property during the lifetime of the tenant for life and it had been sold and a sheriff's deed given, or if they had given a deed *without a warranty*, they might even have been

estopped by their acts and conduct. This is intimated in the statement of the Kline case, 81 O. S.

In the case at bar, the sheriff's deed to Haller carries with it every right, title and interest which the parties had at the time of the sale in the premises, including plaintiff's rights, and not only all the right, title and interest which they actually possessed, but *all those which they claimed in their pleadings and proceedings* to own—and this included a claim to a *fee simple title in remainder*, so found to be in them by the decree of the court.

Again as to the two mortgages executed with a covenant of general warranty in each and which were satisfied out of the purchaser's (Haller) money, *not as a voluntary payment*, but by decree of the court, how stands the plaintiff as to these warranties even though he had no title or interest in the land?

In *Herman on Estoppel*, Vol. 2, p. 796, we find this rule laid down:

“A person who, contracting an obligation to another, grants a mortgage on property of which he is not then the owner, the mortgage is valid if the debtor ever afterwards acquires the ownership of the property by whatever right. That is, a subsequently acquired legal title by the mortgagor inures to the benefit of the mortgagee.” *Boyd v. Longworth*, 11 Ohio, 235; *Philly v. Sanders*, 11 O. S., 490; *Bond v. Swearingen*, 1 Ohio, 395.

Now the warranties in both these mortgages are covenants that *run with the land* and bind the warrantors or grantors of whom plaintiff was one, and inure to the benefit, not only of the mortgagee and his privies, but to those who may thereafter acquire the property, to all grantees of the land. Mark this language of the court in the case above cited, 11 O. S., on page 496:

“An obligation of estoppel binds not only the grantor in such case, but his heirs and subsequent grantees and all privy to him. *It adheres to the land, and is transmitted with the estate whether the same passes by descent or purchase. And the estoppel becomes and ever remains, a muniment of title so acquired; and when the party so estopped conveys the land, he necessarily conveys it subject to such estoppel in the hands of his grantee.*”

1912.]

Williams v. Haller et al.

Now bearing in mind what has been shown to be the nature of the title conveyed by sheriff's deed in partition cases and that the conveyance is really the grant of the parties to the partition suit, is not Haller a grantee of plaintiff's and does not the estoppel arising from the warranties made in the two mortgages adhere to the land as well as run with it and in favor of the mortgagees? Does it not also run to the *subsequent grantee* of plaintiff, Haller, and inure to his benefit as a *muniment of title to the land forever*? A subsequent purchaser of mortgaged property in good faith is protected. *Taft v. Munson*, 57 N. Y., 97; *Laughlin v. Vogelson*, 5 C. C., 407.

But the decree of the court on distribution found the amount due on the mortgages and that they were a lien on the property, and ordered them paid out of Haller's money. Were Haller and those holding under him subrogated to the rights of the mortgagees? It is claimed by plaintiff that Haller was a mere volunteer in paying off the mortgages and that there was no privity between him and the mortgagees. The cases of *Webster v. Goldsmith*, 86 Pa., 409; *Kitzmiller v. Van Rensellar*, 10 O. S., 63, and *Jewett v. Feldheiser*, 68 O. S., 525, are cited and relied on as supporting the claim that Haller, the purchaser of the property in the partition suit, was a mere volunteer in paying off the two mortgagees and that there was no privity between him, Haller, and the mortgagees. We do not think these cases are analogous to the case at bar.

In the Pennsylvania case, 86 Pa., a superintendent of the work of construction on a railroad voluntarily paid off claims against his company and merely to befriend the workmen. Of course in this case there was no obligation on his part to pay the claims, he took no assignment of them, and made no agreement that he was to stand in the workmen's shoes. He derived no benefit from these payments. There could be no subrogation here.

In the 10th O. S. case, a judgment creditor sought to hold the wife's dower interest in her husband's property under his judgment. The judgment was not against her, it did not represent her debt; she did not release to the judgment creditor and he of course was not in privity with her. Her dower could not be thus taken.

The same state of facts appear in 68 O. S. It was sought to sequester the wife's dower in real estate, after the action was barred by the statute of limitations, by a judgment creditor on a claim against the husband alone. The court held that because some of the proceeds of the sale on execution went to pay off a mortgage given by the husband and wife, the wife was not thereby estopped.

We think that the rule to be applied in the case at bar where Haller's money was paid out by order of the court to satisfy the mortgages, and the indebtedness of the plaintiff and his brothers and sister, and to *benefit Haller by clearing his land then purchased, of the liens*, is the rule laid down in *Jones on Mortgages*, Section 869, where it is said:

"If a mortgage be paid by a person not personally liable, for *the purpose of protecting his estate*, he may have the benefit of it in aid of his title without any assignment to him, or proof of any intention on his part to keep it alive."

See, also, *Joyce v. Dauntz*, 55 O. S., 538; *Sheldon on Subrogation*, Section 12; *Amick v. Woodsworth*, 58 O. S., 86.

Under these authorities, even if Haller personally volunteered to pay off these mortgages, he had an interest in the property by his purchase and would be subrogated to the rights of the mortgagees after paying them off. But even though Haller's widow be subrogated to the rights of the mortgagees, this would not defeat the plaintiff's claim in this case if he had the right otherwise to prosecute this action, because there was paid out on account of these mortgagees only about \$2,200, whereas the property sold for something like \$5,200.

Upon careful consideration of the point raised as to the receipt by plaintiff of his distributive share of the proceeds of the sale of the land under the partition proceedings, upon the court's order of distribution and out of Haller's money, which sum he had retained and not offered to repay, it appears to the court that, in the language of Judge Ranney in *Tabler v. Wiseman*, 2 Ohio State, on page 216:

"A party ought not to be permitted *voluntarily* to take the benefits of a judgment and then attempt to reverse it. No more

1912.]

Williams v. Haller et al.

direct affirmance of the validity of the proceeding could be made, than by claiming title to the money of the adverse party received in pursuance of it."

Now while this is not an effort to reverse the decree in partition in the Superior Court of Cincinnati, it is a more irregular proceeding in that it attempts to avoid the decree and its effect upon the plaintiff by a collateral attack upon the proceedings. If the plaintiff could not retain his share of the money paid by Haller for the estate claimed by the parties to the partition suit, and at the same time prosecute error to reverse the judgment to which he was a party, how much less can he maintain this action which ignores the decree in the partition suit?

It is further claimed by the defendant that the statute of limitations, Section 11227, General Code, has run against plaintiff—ten years since the execution, delivery and recording of the sheriff's deed to Haller. This action was begun almost twenty years after the recording of Haller's sheriff's deed. Now the sheriff's deed conveyed to Haller the *legal title in fee simple*. If it be claimed by plaintiff, as he must claim in order to stand at all upon his petition, that nothing more than an estate for the life of Amanda Chamberlain passed, or could have passed by the sheriff's deed to Haller, why is he not barred?

In the case of *Brockschmidt v. Archer*, 64 O. S., 502, an estate similar to that involved in the case at bar was under consideration. A mortgage had been given by the life tenant. The mortgage conveyed the premises in fee simple with covenants of warranty. The obligation not having been paid, the mortgage was foreclosed and a *decree entered for the sale of the life estate*. The land was sold, the sale confirmed and a deed in *fee simple* was made to the purchaser by the sheriff. The purchaser took possession under this deed, and he and his successors in title, of whom defendant Brockschmidt, was the last, continued to occupy the land openly, notoriously and exclusively for forty-two years. The court held that plaintiff's action of ejectment, being the same kind of an action as the one at bar, could not be maintained. On pp. 515 and 516 the court says:



“The sheriff’s deed, notwithstanding the fact that only a life estate had been ordered sold, was made in pursuance of the order of the court and conveyed to the purchaser the legal title in fee simple; and without a reformation, the plaintiff can not recover the land against one having the legal title. They have but an equity at most. They did not ask for a reformation of the deed, and a recovery on it as reformed; and had they done so, the defendant might well have pleaded the statute of limitations to such an action. The deed was executed in 1852, and the purchaser went into possession and he and his successors in title down to and including the defendant have ever since been in the open, and notorious adverse possession of the land, claiming title in fee simple. The right to reform the deed accrued to the mortgagor on the execution of the deed, *for it deprived him of his reversionary estate in the land, which he might otherwise have disposed of for value, although it could only take effect in possession on the termination of his own life.* \* \* \* When Edward died in 1893 (this was one year before the action was commenced in ejectment) *his heirs simply stepped into his shoes, with the same rights in regard to the land as he had at death.*”

The statute which applies to a case of this kind is Section 11227, General Code—ten years statute.

To be sure if the estate devised by Peter McNicoll to Amanda were a fee tail, then the rule laid down by Judge Minshall in *Ream v. Walls*, 61 O. S., 131, at page 146, would apply here. But inasmuch as we have found that it is not a fee tail, but a life estate in Amanda with remainder to her children, we are of the opinion that this case falls under the rule in *Brockschmidt v. Archer, supra*. If plaintiff allowed more than ten years to elapse before bringing his action for a reformation of the sheriff’s deed which should have conveyed *only a life estate*, and not the fee simple, then it would appear that he is barred. The court is not, however, sufficiently clear as to the application of this statute to the case at bar, to rest this decision thereon, but prefers to base it upon the other grounds herein set forth.

In conclusion, the court feels that the plaintiff is not entitled to any great amount of equitable consideration at the hands of the court. He seeks in this collateral attack to avoid the effect of a former decree in partition, to which he was a party. He



1912.]

Williams v. Haller et al.

stood by and allowed an innocent man, now dead, to pay into court the full value of this property; received the full benefits of Haller's money in paying his (plaintiff's) mortgage indebtedness, and received and still retains his full share of the proceeds of the sale of this property, on the basis, claim and representation of a one-fourth interest in fee simple in remainder being vested in him. He has not made restitution of this money or offered to restore it to the imbecile defendant, widow of John Haller. If he had owned the property at the time it was sold, to the same extent that he now claims to own it, he could not have realized more out of it than he did, except the additional share of the value of his mother's life estate, which went to his sister, Ida Chamberlain. The conduct of the plaintiff does not appeal to the moral sensibilities of a chancellor; on the contrary, his attitude toward the defendant, with full knowledge of what he has done to put her in her present deplorable financial condition by taking from her dead husband his own fair share of the value of this property, is shocking to the conscience of the court. Unless, by some *rule of law*, the court is bound to take away from Mrs. Haller, a poor imbecile, unconscious of what is being done against her, this property, then the case is one which does not appeal for favorable consideration in any forum where justice should be administered. No such rule can be found.

The demurrer to the amended and supplemental answers will be overruled, as they present a complete defense to this action.

**TAX VALUATION OF NEWSPAPER PROPERTY.**

Common Pleas Court of Greene County.

J. P. CHEW v. R. R. GRIEVE.

Decided, March 28, 1912.

*Taxation—Newspaper Publisher Not a “Manufacturer”—Valuation for Taxation Purposes of Newspaper Property—Good Will and Earning Capacity Essential Elements of Value.*

1. The publisher of a newspaper is not a “manufacturer” in the sense that he is entitled to make a return of his newspaper property as a manufacturer.
2. In returning newspaper property for taxation it should be listed at its true value in money, and in ascertaining such value good will and earning capacity should be considered together with every other fact or circumstance bearing on the question of value; and this rule is applicable notwithstanding the property may have attained large earning capacity by reason of the ability and skill of its individual managers, and its earnings might be greatly diminished were the management changed.

*C. L. Darlington*, for plaintiff.

*Frank L. Johnson*, Prosecuting Attorney, for defendant.

JONES, J.

This court is unable to agree with the contention of plaintiff that the publisher of a newspaper is a “manufacturer” and entitled to make a return and be assessed for taxation as such. Such a definition has been held in a number of cases to apply to a publisher of books, or even to a producer of stationery, or a job printer, but a distinction is made between these occupations and that of printing a newspaper. The publisher of a newspaper does not combine, refine or change the character of any raw material. He takes sheets of paper, a finished product, and by means of other finished products, type and ink, he impresses characters upon the paper, which enhances its value, for the time being, at least, but it is still a sheet of paper.

1912.]

Chew v. Grieve.

In our own state, as was forcibly remarked by Judge Shearer of our own circuit court, in an interesting and thorough opinion in *Village of Tippecanoe v. Boercher*, 5th O. C. C. Rep., 6, 8, we get little aid from the language of the statute in determining in any particular case, who is a manufacturer, for, as he says, "reduced to the last analysis a manufacturer is a manufacturer." In the view of this court, the enhancement in value of the plain sheet of paper, when it is covered with interesting printed matter, does not make the printer or publisher a manufacturer, more than the painter or artist who enhances the value of a canvas or a sheet of cardboard, or a board or piece of metal (all finished products in themselves), by placing on them a picture, drawing or a sign.

I am unable to find any reported decision in Ohio as to newspaper publishers, but outside the state the decided weight of authority seems to be that they are not considered as manufacturers for the purpose of taxation. For a full collection of these authorities see very full notes in 40th American Reports, 446; 52d American Reports, 107 to 109; especially 62d L.R.A., 62, 63, 64.

Outside of one federal decision, the only states that seem to have held a newspaper publisher to be a manufacturer are Utah and Louisiana. The case in the latter state (see 62d L.R.A., 63) was decided by a divided court, and in a later case the Supreme Court of that state seem to have reached a different conclusion, for it held that:

" 'Manufacture,' in its ordinary sense, means the changing of raw material into some new useful form. Its natural import is to produce an article, so that a thing is not usually said to be manufactured unless its form is materially changed. A change or addition in or to the mode of use of an article already manufactured can not be considered a manufacture, so that under a statute exempting from taxation property employed in manufactures, printing machinery by which letters and bill-heads are printed on blank paper is not exempt." *Patterson v. New Orleans*, 16th South., 815; 47th La. Ann., 275. Referred to in "Words & Phrases Judicially Defined," Vol. 5, page 4355.

See also *Oswald v. St. Paul Globe Pt. Co.*, 60th Minn., 82; 61st N. W., 902, 903.

The plaintiff, then, being subject to the general rule requiring his property to be assessed for taxation at its true value in money, did the board of revision adopt an improper and illegal method in ascertaining and fixing such value?

It is averred that the plaintiff's return for taxation was \$4,500, which was increased by the board, \$13,500, of which increase \$2,000 was on the machinery, materials and stock, and \$11,500 on the estimated gross annual receipts for subscriptions.

The record of the board itself simply states that the board found the actual value of plaintiff's plant, excluding real estate, to be \$18,000, and ordered it placed upon the duplicate for that sum, without reciting how that conclusion was reached. It is also recited in the minutes of the board that the plaintiff stated that he would not take \$25,000 for his plant in question.

It is true that the income of a newspaper depends largely upon the editorial skill, and mental ability and judgment of the man who is its editor, and that the amount of such income may fluctuate largely, according to the degree with which such skill and judgment is exercised. It is also true that the "good will" of such paper is an intangible element of its value, and may be largely decreased, or almost destroyed by changes in public opinion, or sometimes in a manner difficult to account for at all. It is also true that we have no tax on incomes, professional or otherwise, and that it would be improper to, in effect, subject the skill of an editor, author, lawyer or physician to a tax, by estimating his supposed earning capacity and taxing him thereon.

Still the proprietor of a newspaper, even if he happen to be also the editor, whose talent is responsible largely for the success of his journal, does not stand in precisely the same position as the other professional men named. He has a *business* as well as a profession, a business which he can sell, while

1912.]

Chew v. Grieve.

they have nothing that is marketable—nothing that they can transfer to others. A successful lawyer or physician desiring to retire, could probably realize but little more on a sale than the intrinsic value of his library and fixtures, but no successful newspaper publisher would dream of selling his plant for the mere appraised value of its contents.

An old fashioned newspaper plant publishing a popular and well established paper would probably sell for many times more than a new, modernly equipped office that had yet to gain and retain its constituency of subscribers.

Can this good will, intangible though it may be in its nature, be considered as an element in assessing the property for taxation? In this state the question has been determined in the affirmative by the highest court.

In the elaborate notes to the decision in *State Board of Education v. Goggins*, 58th L.R.A., 513, it is said on page 567:

“To the state of Ohio belongs the distinction of being the first to recognize in express terms, the taxability of good will as an element of capital stock.”

The case referred to is the well known “Nicholls’ Law Case,” *State, ex rel, v. Jones, Auditor*, 51st O. S., 492. The language of the court on page 512, is most appropriate to the case at bar:

“If by reason of the good will of the concern, or the skill, experience, and energy with which its business is conducted, the market value of the capital stock is largely increased, whereby the value of the tangible property of the corporation, considered as an entire plant, acquires a greater market value than it otherwise would have had it can not properly be said not to be its true value in money within the meaning of the Constitution, because good will and other elements indirectly entered into its value. The market value of property is what it will bring when sold as such property is ordinarily sold in the community where it is situated; and the fact that it is its market value can not be questioned because attributed somewhat to good will, franchise, skillful management of the property, or any other legitimate agency.”

The doctrine of this case, as is well known, was approved by the U. S. Supreme Court, in 165th U. S., 294, and 166th U. S., 185.

In the "telephone case," *State, ex rel, v. Halliday*, 61st O. S., 352, 3d. syll., the Supreme Court said:

"In ascertaining the true value in money of such property in the hands of its owner, every fact or circumstance brought to the attention of the person or officer who is charged with the duty of fixing that value, and which in its nature bears on the question, should be considered by him. One of those circumstances is the earnings or rental of such article."

The opinion in this case is too long to be quoted here, but it is replete with reasoning applicable to the case at bar.

The Supreme Court of the United States said emphatically and tersely:

"Whatever property is worth for the purposes of income and sale, it is also worth for the purposes of taxation." *Adams Express Co. v. Ohio State Auditor*, 10th Ohio Federal Decisions, 426, syll. 4.

Further citation of authorities on this proposition would seem superfluous.

If "every fact and circumstance" bearing on the question of value, including the earning capacity, which is brought to the attention of the board, is to be considered by them in fixing value, and if the selling value is the tax value, then the board had the right to consider the statement of the plaintiff that the plant earned a gross income of \$11,500 and that he would not sell it for \$25,000.

If the board found the value of the plant to be a certain amount (less than that fixed by its owner), is not that finding, unless impeached for fraud, or as palpably excessive, conclusive and not subject to review by the court. The board is charged with the duty of making this valuation; the court is not.

In *Wagner v. Loomis*, 37th O. S., 571, the Supreme Court said:

1912.]

Chew v. Grieve.

“As a general rule, the decisions of officers and tribunals specially created and charged in tax laws with the duty of valuing property for taxation, and equalizing, such valuations are final and conclusive.”

It would seem if the board has assessed a valuation for this property, which can not be impeached on the ground already mentioned, that the result of its deliberations can not be successfully attacked on account of the method by which such conclusion was arrived at—on the same principle that a correct judicial decision will not be reversed because the court gave the wrong reason for arriving at it.

The burden of proof is on the plaintiff to make out a *clear* cause for an injunction. *Spangler v. Cleveland*, 43 O. S., 526.

It does not seem to this court that such a case has been made out as would justify the interposition by the judicial branch of the government with the proceedings of officers specially charged with duties in the department of valuing property for taxation.

It may be remarked that if the value of the good will of this property should change hereafter, that there are opportunities offered from year to year, by which a reduction in its valuation for taxation may be secured to correspond with such decreased real value.

Some reference was made in oral argument as to whether the court had any jurisdiction to review in any way the proceedings of the board. The jurisdiction of the court to enjoin illegal taxes on the duplicate from collection is conferred by statute, but there is also a general rule that the party complaining must exhaust his other remedies, if any, in the way of appeal or review by other taxing boards or officers before coming into court. See authorities collected in Michie's Ohio Enc. Dig., Vol. 13, page 788, par. 4, particularly *Mitchell v. Treasurer*, 25th O. S., 143, 158. It is difficult for this court to see what other remedy the plaintiff had in this case other than the one he has invoked, unless possibly he might have appealed to the Ohio Tax Commission under the provisions of Vol. 102 Ohio Laws, page 258, Section 151 (General Code, 5617-6). See also General Code,

Sections 5617-3 and 5617-8. In view of the conclusion the court has reached, it is unnecessary to further discuss this proposition.

The demurrer to the petition must be sustained.

The court wishes to express its appreciation of the very able manner in which both counsel have presented this case, and to thank them for the help afforded by their excellent briefs.

---

**NECESSARY AVERMENTS IN AN ACTION FOR DAMAGES  
FOR BREACH OF CONTRACT.**

Common Pleas Court of Hamilton County.

WILLIAM BOSWELL V. THE SECURITY LIFE INSURANCE COMPANY.

Decided, April 22, 1912.

*Pleading—Averments as to an Agreement, Alleged to be in Breach, Are Sufficient, When—Essential Allegations Can Not be Reached by a Motion to Strike Out—Brevity Essential, But Should be Subordinated to Purposes of the Code—Facts Excusing Non-Performance Not Immaterial or Irrelevant—Election Can Not be Required as Between Allegations of Fact—Pleading of Inconsistent Allegations of Fact in the Alternative—Evidential and Ultimate Facts.*

1. An allegation of an agreement is often an allegation of mixed law and fact, and it is sufficient to allege the agreement as it was at the time of the breach without giving all the agreements and modifications thereof resulting in the ultimate agreement.
2. Except as specifically provided by the code, an insertion of agreements bodily in a petition is not good pleading, but the remedy is not a motion to strike out but for a reformation of the petition. However informal a pleading may be a court can not strike out allegations essential to plaintiff's cause of action.
3. Where the line between evidential and ultimate facts is not clear and the plaintiff relies upon certain well defined facts in support of what otherwise would be an essential allegation of mixed law and fact, he should be allowed to plead them so that the issues as to such facts of their sufficiency may be clearly presented. Brevity



1912.]

Boswell v. Insurance Co.

- in pleading is to be desired and is accomplished by the allegation of ultimate facts, but should be subordinate to the purposes of the code, which is to present clear and separate issues of law and fact.
4. Facts constituting excuses for non-performance of condition, waiver of performance, estoppel to claim non-performance, and interpretation by the parties themselves of ambiguous conditions are not immaterial nor irrelevant.
  5. Allegations of fact in a petition not pleaded in the alternative, all of which may be true and therefore not inconsistent although the plaintiff is not required to establish all and might ultimately elect to establish one or more, may be and should ordinarily be alleged in one statement as a cause of action; but whether so alleged or divided into separate statements or counts, each sufficient as a cause of action, the plaintiff is not required to elect between them.
  6. If the allegations of fact can not all be true and are therefore inconsistent, nevertheless, if they are such that the plaintiff can have a fair doubt as to which he can establish, he may be permitted without error, and therefore in such cases should be allowed to plead such facts in the alternative in the form of separately numbered statements or counts.

*Bettinger, Guckenberger, Schmitt & Kreis*, for plaintiff.

*Williams, Taylor & Nash*, contra.

HUNT, J.

This is an action for damages for breach of contract.

The plaintiff alleges that on October 30th, 1901, he entered into a contract with defendant to act as its general agent in the states of Ohio, West Virginia and Kentucky, for the purpose of procuring applications for life insurance; that by said agreement, upon certain specified classes of policies of insurance, he was to receive certain specified commissions and that said contract was to continue in force so long as conditions thereof were fulfilled; the other stipulations or conditions of the contract are not alleged in the petition, but the petition states that "a copy of such contract is hereto attached, marked 'Exhibit A,' and made a part hereof."

Plaintiff further says that on the same day a second contract, attached and made part of the petition as "Exhibit B," was entered into with defendant, whereby said first contract was modified and depending upon plaintiff securing certain specified

amounts of insurance during any one year, certain specified additional percentages of commissions were to be paid to plaintiff for such years; that on April 14, 1902, a further contract, attached and made part of the petition as "Exhibit C," was entered into, further modifying certain specified paragraphs of said first contract; that on March 23, 1905, a further written contract, attached and made part of the petition as "Exhibit D," was entered into, modifying said first contract by providing that said contract should continue in force for twenty years from its date; that on December 18, 1901, a further contract was entered into, attached and made part of the petition as "Exhibit E," by which said first contract was further modified by including the state of Tennessee in the territory specified therein; that on December 15, 1903, a further contract, attached and made part of the petition as "Exhibit F," was entered into, making certain specified changes in the minimum paid for new business in said state of Tennessee; that the plaintiff until January 1, 1912, had fully performed all the terms and conditions of said contract and modifications thereof.

Plaintiff further says that it was necessary for plaintiff to employ, and plaintiff has employed many sub-agents, and has expended money in the sum of about \$50,000 in putting said agency on a profitable basis to plaintiff and defendants, all of which said defendants well know; that on January 1, 1912, defendant notified plaintiff that it would thereafter refuse to pay to plaintiff the amounts of commissions secured by said contract, claiming a right to terminate said contract because plaintiff had not secured during 1911, the sum of \$2,900,000 of insurance, and that by reasons of such refusal plaintiff ceased to act as the general agent of defendant.

Plaintiff further alleges that defendant never intended to have such right to so terminate said contract, and further alleges the intention of defendant in that regard; that prior to April 14, 1902, a question arose as to such right, and that defendant through its president and general manager informed plaintiff that such right was not intended to be created by such contract,

1912.]

Boswell v. Insurance Co.

and expressly disclaimed any such right; that by reason of such representations and disclaimer by defendant, plaintiff continued to act as the agent of the defendant, spending his time and money as aforesaid; that plaintiff and defendant both knew that plaintiff could not be repaid and obtain a reasonable profit from his agency, except during the last ten years of the contract, which profit and repayments of expenditures plaintiff expected; that the amount of insurance produced by plaintiff in every year except 1909 and 1910 was less than \$2,900,000, and that the business of the year 1910 was the result of high pressure methods; that defendant at no time claimed the right to terminate said contract for failure of plaintiff to produce \$2,900,000 of insurance during any one year until about January 1, 1912; that defendant since the making of said contract has ceased to issue certain of its most saleable policies and has diminished the amount of insurance to be issued upon any one life, thereby precluding plaintiff during the year of 1911 and thereafter from producing \$2,900,000 of insurance per year; that in 1906, defendant by reason of the Armstrong law enacted by the state of New York, refused to pay plaintiff the amount of commissions secured by his contract until his right thereto should be determined by a suit to be brought by him in New York; that such suit was brought, and after two years litigation it was finally determined in plaintiff's favor, by reason of which litigation plaintiff was unable to pay sub-agents, lost many of them and the business which they were producing, and was thereby precluded from writing insurance in the amount of \$2,900,000 per year.

Plaintiff alleges that he has been damaged in the sum of \$250,000.

Defendant by motion and supplemental motion moves to strike out some twenty-four clauses or paragraphs of the petition and to make more definite and certain others, and alternatively, certain of the twenty-four.

Defendant in support of said motions claims that it is not good pleading to plead the various contracts by attaching to the petition and making part thereof copies as exhibits; that as to the

contracts, especially as to those in writing, the intention of the parties at the time or thereafter is immaterial; that any communications prior to the making of any contract are immaterial in its construction; that the expectation of the plaintiff and his expenditures of time and money thereby are immaterial; that the allegation of certain other facts which would be relevant only by way of waiver by defendant, or excuse to the plaintiff, for non-performance, or estoppel upon defendant to claim non-performance, are insufficient and inconsistent, in view of the allegation of performance, being in effect pleading in the alternative, and further that many of the allegations of the petition, upon any theory of waiver, excuse, modification of contract, estoppel, mutual interpretation thereof, are mere evidential facts.

An allegation of agreement is often an allegation of mixed law and fact, and it is sufficient to allege the agreement as it was at the time of the breach, without giving all the agreements and modifications thereof, resulting in the ultimate agreement existing at the time of breach, but the objection of defendant is not to the allegation of the various agreements, but to the manner thereof.

The petition in this case, without reference to the exhibits as part thereof, would not enable the court to ascertain what was the ultimate contract between the plaintiff and defendant at the time of the alleged breach, and except for said exhibits, in view of the general allegation of performance permitted by the code, the allegation of facts claimed to constitute waiver, excuse, estoppel by conduct and representations, and impliedly agreed interpretation of ambiguity, would be irrelevant and immaterial. Considering such exhibits as part of the petition, and the plaintiff has made them a part thereof, such allegations, unless mere evidential facts, are essential to plaintiff's cause of action if the allegation of performance should not be established. In the case of *Crawford v. Satfield*, 27 O. S., 421, it is said that to so plead contracts, to-wit, by inserting them bodily into the petition, is not good pleading, nevertheless the remedy in such case is not by motion to strike out, although a reformation of the pleading

1912.]

Boswell v. Insurance Co.

could be ordered. However informal the pleading may be, the court can not strike out allegations essential to plaintiff's cause of action.

The line between mere evidential facts and ultimate facts is not always clear. Allegations of ultimate facts are often allegations of mixed law and fact, and as the object of the code is to present a clear cut issue as to facts and the sufficiency of such facts rather than the pleader's construction thereof, if the pleader relies upon specific well defined facts and conditions in support of what would otherwise be an essential allegation of mixed law and fact, he should be allowed in doubtful cases at least, to plead them, so that issue as to such facts or their sufficiency might be clearly presented. The same rule applies to waiver, performance, excuse and many other allegations. The allegation that the defendant is estopped is a mere legal conclusion, and the facts relied upon to constitute the estoppel are not merely evidential.

What the intention of the parties may have been in entering into an agreement or thereafter, is immaterial, except as derived from a construction of said agreements, but in such construction, circumstances surrounding the parties, particularly when known to both, can be shown in construing latent ambiguities, and if in lieu of pleading the ultimate agreement the facts constituting the agreement are pleaded, surrounding circumstances are not necessarily immaterial or irrelevant.

Facts constituting excuse for non-performance are manifestly not irrelevant. Allegations that the plaintiff relied upon certain facts are immaterial inasmuch as the question is not what he relied upon but what he did, and to what extent the defendant knew of what he did, and the legal effect thereof. Allegations as to high pressure methods are admitted to be irrelevant. While allegations as to the mere intention of the parties is ordinarily immaterial, nevertheless if such intentions are communicated to the other party after the making of the contract for the purpose of inducing the other to take some action affecting the other's rights, and such object is accomplished, such fact might constitute an estoppel. Acts of interpretation by the parties them-

selves, are not necessarily immaterial if there is such a clear acquiescence by both parties thereto as to constitute an implied modification of the contract or an estoppel, at least, until reasonable notice of an intention to insist on the strict terms of the contract. In case of ambiguity in the terms of such contract, such acts of interpretation are always relevant in the construction of the contract.

If the plaintiff is not required to allege the ultimate contract between the parties at the time of the breach, such acts would be relevant as facts from which the contract can as a matter of law be said to exist as a fact. Brevity in pleading is to be desired, and is accomplished by the allegation of ultimate facts, but in doubtful cases at least should be subordinate to the purpose of the code, which is to present clear and separate issues of law and fact. Necessarily where facts are alleged they should be alleged with that certainty necessary to advise the opposite party and to further the presentation of an issue of law or fact; otherwise, the ultimate fact alone should be alleged.

If the plaintiff relies on his allegation of performance permitted by the code, the allegations as to the employment of sub-agents, expenditures of time and money not being alleged as special damages, are immaterial, but the plaintiff in this case makes not only the general allegation of performance, but also pleads the acts of performance in connection with waiver, excuse and estoppel as to non-performance. Either would constitute a cause of action between which neither the defendant nor the court can elect for plaintiff.

The general rule seems to be that allegations of fact in a petition, all of which may be true, therefore not inconsistent, although the plaintiff would not be required to establish all to recover and therefore might ultimately elect to establish any one or more of them, should be and certainly may be alleged in one statement as one cause of action. *Fox v. Penn. Ry. Co.*, 2 Handy, 170; *Sturgis v. Burton*, 8 O. S., 215; *Ferguson v. Gilbert*, 16 O. S., 88; *Bates on Pleading and Practice*, 495, 2768.

Nevertheless, if such allegations could be divided into separate statements, each sufficient as a cause of action although only one

1912.]

Boswell v. Insurance Co.

recovery could be had, if such causes of action are joinable under the code the courts have not required the plaintiff to elect between them. *Murphy v. Quigley*, 21 C. C., 313; *Pennsylvania Ry. Co. v. Miller*, 35 O. S., 541.

If the allegations of fact can not all be true and are therefore inconsistent, nevertheless if they are such that the plaintiff could have a fair doubt as to which he could establish, he may be permitted without error, in the interest of justice, to plead such facts in the alternative in the form of separately numbered statements or counts, which for the purpose of tendering an issue of law or fact, are regarded as separate causes of action, although but one recovery can be had.

This has not yet been determined by the Supreme Court of Ohio, but the Superior Court of Cincinnati, in well considered cases, has decided that to so plead was a right: *Bank v. Ry. Co.*, 9 Bul., 355; *Bank v. Ry. Co.*, 11 Bul., 86; *Bank v. Ry. Co.*, 16 Bul., 399.

The circuit court of this district, while condemning the practice, has held that to so permit is not prejudicial error. *Railway Co. v. Bank*, 1 C. C., 199.

The code, Section 11305, provides that the petition shall contain "a statement of facts constituting a cause of action in ordinary and concise language," and further provides that pleadings shall be verified by affidavit that "the affiant believes the facts stated in the pleading to be true" (Sections 11351, 11354, General Code). Inconsistent allegations can not both be true, and where the pleader in the interests of justice is permitted to make such allegations under oath, such right should be so exercised that the other provisions of the code can be made effective to bring about the issues of law and fact separately provided for in Sections 11376 and 11379, General Code. How can such result be obtained in pleading in the alternative, unless the plaintiff is given the same margin of belief as is permitted to the defendant, so that the demurrer and answer provided for in the code can be directed to all or each of the alternative allegations of fact presented by plaintiff's petition. This can be done only by requiring such alternative and inconsistent pleading when



permitted to be made in separate counts or statements, or as separate causes of action.

In this case, considering the exhibits of contracts, etc., attached to the petition as included therein by the allegation of the plaintiff, the plaintiff being in doubt as to whether to treat the agreement in regard to the amount of insurance as a condition or as modified by the parties, or waived, or as ineffective by reason of a valid excuse or estoppel, alleges full performance, and also the facts which might constitute a waiver, excuse, or estoppel of any one count by a single cause of action, thereby compelling the defendant having the right to the same doubt, to answer or demur as to all, thereby precluding him from answering as to performance, and if he should see fit to admit by demurrer the facts alleged as constituting waiver, excuse or estoppel, precluding him from raising by such demurrer, the question of the sufficiency of such facts. If in the interests of justice the plaintiff is allowed to plead in the alternative, in the interests of justice to the defendant the plaintiff should be required to so plead in separate counts or separate causes of action.

Alternative pleading is permissible, or even if not permissible, the province of a motion is not to test the sufficiency of the allegations of a petition unless manifestly immaterial or irrelevant to any cause of action stated in the petition. Neither the defendant nor the court is permitted to elect for the plaintiff, and strike out allegations which would leave the petition insufficient in law as to any cause of action in the petition however informally stated.

For the reasons above stated the motion of the defendant is overruled as to the following clauses of said motion, to-wit:

I. Clauses 1, 2, 3, 4, 5, 6, 7, 8, 9, 12, 13, 15, 15a, 16, 17, except as to the last sentence thereof, 18, 20, 21, 22, 23 and 24.

II. Clauses 2, 3 and 7.

And granted as to:

I. Clauses 10, 11, 12a, 12x, 12y, 12z, 13w, 13x, 13y, 13z, 14, 17 as to the last sentence, and 19.

II. Clauses 1, 4, 5 and 6.

The supplemental motion is overruled.



1912.]

Archer v. Mt. Gilead.

**AS TO RECOVERY OF COSTS IN AN ACTION FOR  
A NUISANCE.**

Common Pleas Court of Morrow County.

THOMAS J. ARCHER v. INCORPORATED VILLAGE OF MT. GILEAD.

Decided, August 13, 1912.

*Costs—May Be Recovered in an Action for Maintaining a Nuisance,  
When—Horse Injured in Hole in Street—Sections 11626 and 10232.*

1. An action for damages for injury to a horse resulting from a hole in a public street is an action for a nuisance.
2. Inasmuch as justices of the peace do not have jurisdiction in such a case, a plaintiff recovering a judgment for less than \$100 and more than \$5 may also recover his costs.

*Thomas J. Archer, for plaintiff.**J. W. Barry, contra.*

DEVOR, J.

This cause is submitted to the court upon a motion to retax costs.

The plaintiff brought an action against the defendant in the Common Pleas Court of Morrow County, Ohio, to recover \$110 for injury to his horse on the streets of Mt. Gilead, Ohio.

The petition alleged that the defendant without exercising ordinary care negligently suffered a deep and dangerous hole to be open at a watering place for horses in a public street of said village without any light or protection of any kind whatever; that without fault on his part and whilst driving a team of horses over said street one of his horses fell into said hole and was injured.

The answer set up contributory negligence and denied liability.

The jury returned a verdict for \$53.41 for plaintiff. Motion for new trial was overruled and judgment entered against the defendant for \$53.41, with all costs.

A motion to re-tax the costs is submitted by defendant and it is contended that the plaintiff can not recover his costs, because:

1. The verdict was less than \$100 and a justice of the peace had jurisdiction.
2. The action is not one for the abatement of a nuisance.
3. The court is without jurisdiction to render judgment against defendant for plaintiff's costs.
4. That the action is one for injury to personal property.

"Costs are only recoverable by force of the statute law, and the allowance of them in any case depends upon the terms of the statutes.

"Costs are unknown at common law and can only be given by statutory directions." *Bennett v. Kroth*, 37 Kan., 235.

Did a justice of the peace have jurisdiction of this action?

It is clear that if a justice of the peace had jurisdiction of this action, the plaintiff can not recover his costs.

Section 11626, General Code, provides that "in all actions for libel, slander, malicious prosecution, assault, assault and battery, false imprisonment, criminal conversation or seduction, actions for nuisance, or against a justice of the peace for misconduct in office, when the damage assessed is under five dollars, the plaintiff shall not recover costs."

In some of these actions that are mentioned in the above section, it is specifically provided by Section 10232, General Code, that the justice of the peace shall not have jurisdiction; and in others, as false imprisonment, criminal conversation or seduction and actions for nuisance, the statute is silent as to the jurisdiction of the justice.

1. Can an action for damages for a nuisance be brought before a justice of the peace? And
2. What is an action for a nuisance? And
3. What is a nuisance?

A nuisance is defined as anything that worketh hurt, inconvenience, or damage.

[1912.]

Archer v. Mt. Gilead.

An action for a nuisance "certainly can not be an action to abate a nuisance. An action for slander, for assault and battery, etc., is certainly an action for damages resulting from the slander, the assault and battery, etc. By analogy, an action for a nuisance is an action for damages resulting from a nuisance."

"We conclude that the general accepted rule is that although the nuisance be a public one, yet it is private also, if an individual sustain a special injury thereby, and he may maintain an action and recover his special damage." *Cardington v. Fredericktown*, 46 Ohio St., 442.

Section 3714, General Code, provides that "municipal corporations shall have special power to regulate the use of the streets, to be exercised in the manner provided by law. The council shall have the care, supervision and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts and viaducts, within the corporation, and shall cause them to be kept open, in repair, and free from nuisance."

"Any act or obstruction which unnecessarily incommodes or impedes the lawful use of a highway by the public is a nuisance." *State v. Carpenter*, 68 Wis., 165.

"Thus it is a nuisance at common law to dig a ditch on a highway." *Commonwealth v. McNaugher*, 131 Pa. St., 55.

"A city creating such an obstruction in its streets is as guilty of creating a nuisance as an individual would be." *Hughes v. Fond du Lac*, 73 Wis., 380.

"A municipal corporation is liable in damages to private persons who have been specially injured through its failure to prevent or abate nuisances, consisting of defects in its public highways, etc., dangerous to public travel, from which injury results to travelers without their negligence or fault." 2 *Thompson, Negligence*, Section 5859.

In Bates' Plead. & Prac., p. 2322, Chapter on Nuisances, forms of actions for damages are provided for the pleader on the following subjects:

1. Unguarded excavations next to sidewalks.
2. Cellar hole in sidewalk open or defectively covered.
3. Building material or trench in street, etc.

It is the opinion of the court that this action is an action for a nuisance.

Are all the actions mentioned in Section 11626, General Code, quoted above, excluded from the jurisdiction of justices of the peace?

This section of the statute was long ago construed by the Supreme Court of Ohio, in *Nichol v. Patterson*, 4 Ohio, 200, in which the court say:

“The same class of cases has long been excluded from the jurisdiction of justices of the peace.

“Upon a fair comparison of these acts and a correct construction of their provisions, no doubt can be entertained, that the Legislature considered the action on the case for nuisance not within the jurisdiction of justices of the peace.”

Supporting the same proposition is *Harrington v. Heath*, 15 Ohio, 486.

So it is the opinion of the court that a justice of the peace did not have jurisdiction of this action, and the plaintiff having recovered more than \$5, he is entitled to recover his costs.

Motion to re-tax overruled and exceptions.

1912.]

Railway v. Edmondson.

**CORRECTIONS OF TAX DUPLICATE BY COUNTY AUDITOR.**

Common Pleas Court of Hamilton County.

THE CINCINNATI, NEWPORT & COVINGTON RAILWAY COMPANY V.  
ROBERT E. EDMONDSON, AUDITOR OF HAMILTON COUNTY,  
AND WILLIAM A. HOPKINS, TREASURER OF  
HAMILTON COUNTY.

Decided, October 16, 1912.

*Taxation—Construction of Tax Commission Act—With Reference to  
Corrections of Duplicate Made by County Auditor—Act Operates  
Prospectively Only—Auditors Were Not Deprived of Authority to  
Make Corrections in Duplicate of 1911.*

Giving to the act creating the Tax Commission of Ohio the prospective effect required by the rules of construction, it follows that the power with which the commission was clothed operated only upon returns made to it, and a correction of his duplicate made by a county auditor before the close of 1910 was not affected by this act, and was a legally authorized correction of the duplicate.

*Maxwell & Ramsey and Ernst, Cassatt & Cottle, for the street railway company.*

*Pogue, Campbell & Groom, for the county officials.*

CUSHING, J.

This action is brought by the Cincinnati, Newport & Covington Railway Company to enjoin the auditor and treasurer of Hamilton county from levying and proceeding to collect certain taxes which the defendants claim are due and owing from the plaintiff to Hamilton county, and which at the time of the issuing of the temporary order herein the defendants were proceeding to enforce and collect.

The record presents a number of questions: first, that sufficient notice was not given plaintiff of the auditor's intention to correct, by making additions to the tax duplicate; second, that the plaintiff had secured a temporary restraining order against

tions of their duplicates with reference to public utility corporations. This language, according to the plaintiff, should be given a retrospective effect: that is, because the commission was vested with powers theretofore exercised by county auditors it means that that power should be exercised over the records of county auditors that were in existence prior to July 1, 1910. This, it seems to me, would be reading into the law something that is not therein expressed. Courts have no power in construing a statute to read into or take from the law a syllable, word, sentence or clause. They must construe the language used by the Legislature.

If the law is given prospective effect only, the construction then would be that after the commission had made a record of public utility companies for taxation, that the commission would have the same powers that had theretofore been exercised by county auditors in correcting its record or making additions thereto.

That part of Section 74 of the act giving the commission the power possessed by county auditors must be read in connection with the entire section. The first part of Section 74 provides for "Notice of Assessment." The second part defines the "Power of the Commission" as follows:

"After the assessment of the property of any such public utility for taxation by the commission, and before the confiscation by it of the apportioned value to the county, or to the several counties as herein provided, the commission may, on the application of any such public utility or any person interested therein, or on its own motion, correct the assessment or valuation of its property, in such manner as will in its judgment, make the valuation thereof just and equal. The commission shall have and may exercise all the powers possessed by county auditors under Sections 5390, etc., \* \* \* and all such public utilities shall be subject to all the provisions and penalties of said sections."

The construction of this section, for which plaintiff contends, is that the sentence, "The commission shall have and may exercise all the powers possessed by county auditors," etc., vests in

1912.]

Railway v. Edmondson.

the commission the power to make corrections of county auditors' duplicates after July 1st, 1910, and that such auditors were by the act divested of any power over their records for the years in question. This sentence should be read in connection with the preceding sentence on the same branch of the subject, viz.: "After the assessment of the property of any such public utility for taxation by the commission," etc.

The rule of construction is that, "the language of a statute is its most natural expositor, and where its language is susceptible of a reasonable interpretation, it is not to be controlled by any extraneous considerations.

It would seem, therefore, that the legislative intent was that after the commission had assessed a public utility for taxation it should have and could exercise all the power, in case of its own records, possessed by county auditors. This construction renders the language of the entire section clear, definite and consistent.

It is further contended by counsel for plaintiff that the following sentence from Section 115 of the act controls Section 74, and divests county auditors of all power over their own records after July 1st, 1910:

Section 115. "All powers, duties and privileges imposed and conferred upon any state board, which board is by this act abolished of its powers and duties in whole or in part conferred upon this commission, or any power or duty which has heretofore been conferred upon any state or county officer or board, which power and duty is hereby conferred upon the commission, is hereby imposed and conferred upon the commission created by this act; provided, that the powers and duties so transferred by this act shall continue to be exercised under existing laws until such time as the commission hereby created has been appointed and qualified." \* \* \*

It is clear that Section 74 limits the power of the commission to a correction of its own records and does not confer any authority on the commission to make corrections in or additions to the records of the various county auditors in the state prior to January, 1911. Section 115 does not confer any power on

the commission. The most that could be claimed for the section is that it divests boards and state and county officers of a power theretofore exercised by them. If this construction is given Section 115, there would be a gap of six months wherein no board, officer or commission would have power over matters of taxation in connection with public utilities. The Legislature will be presumed to have enacted laws for the public good. Such would not be the case if the contention of plaintiff is the law. If my view of the law is correct, viz.: that the grant of power is limited by Section 74 to a correction of the commission's records, and their records could not be made until after January 1st, 1911, then Section 115 must be held to apply to the making and correcting of records by the commission, and it does not divest county auditors of their power to correct, or make additions to records made by them prior to the appointment and qualification of the said Tax Commission. This view seems to be strengthened by the language of Section 123:

“This act shall in no manner affect existing causes of action or pending actions, proceedings or prosecutions.”

If Sections 74 and 115 are inconsistent, as they evidently are, Section 74 must prevail over Section 115.

“Where the first clause of a section of an act of the Legislature conforms to the obvious policy and intent of the legislators, as elsewhere indicated in the act, it is not rendered inoperative and void by a later inconsistent clause which does not conform to this policy and intent. In such cases the latter clause is nugatory and must be disregarded.” *McCormick v. Village of Duluth*, 47 Minn., 272.

If the proper return for taxes was not made by the plaintiff for the years claimed, there existed a cause of action against the plaintiff. The statute is specific as to existing causes of action.

The Supreme Court of Illinois, in passing upon the question of statutes having a retrospective effect or retroactive operation in a case where the law was changed with reference to judgments affecting real estate, say:



1912.]

Railway v. Edmondson.

“There is nothing in either of said statutes indicating they were intended to have a retrospective operation, or were to apply to judgments which had already become liens upon real estate under prior laws. The language all refers to the future. Retrospective laws are not looked upon with favor. Statutes are usually construed as operating on cases which come into existence after the statutes are passed, unless a retrospective effect is clearly intended.” (Citing cases.) “In the latter case it was said that, ‘although the words of the statute are broad enough in their literal extent, to comprehend existing cases, they must yet be construed as applicable only to cases that may thereafter arise unless a contrary intention is unequivocally expressed therein.’

“So it may be said in reference to the act of May 26, 1897, that there is nothing in its language indicating that it was to have a retrospective operation, and prevent actions on contracts previously made, or for the enforcement and protection of vested rights. The terms of the act, construed in accordance with the rules of construction above announced, apply to the future, and not to the past.” *Richardson v. U. S. Mortgage Co.*, 194 Ill., 268.

In the case of *Jiminson v. Adams County*, 130 Ill., 560, facts stated at page 563, the court say:

“It is a general rule that a statute will be construed to be prospective, and not retroactive in its operation, unless it clearly appears that the Legislature intended it to have a retrospective effect. In the absence of a clear manifestation of such legislative intent, statutes will be construed as not to prejudice or affect past transactions.” (Citing *Thompson v. Alexander*, 11 Ill., 54; *Conway v. Cable et al*, 37 *id.*, 82; *Knight v. Begole*, 56 *id.*, 122; *In re Tuller*, 79 *id.*, 99.)

The Supreme Court of Virginia, in passing upon the same question, say:

“The principle of the law is well settled, that, ‘although the words of a statute are broad enough in their literal extent to comprehend existing cases, they must be construed as applicable only to cases that may thereafter arise, unless a contrary intention is unequivocally expressed therein.’” *Campbell v. Nonpareil Co.*, 75 Va., 298.

The same court in another case uses this language:

“The general principle deduced from these authorities is, ‘that no statute is to have a retrospect beyond the time of its commencement; and this principle is of such obvious convenience and justice that it must always be adhered to unless in cases where there is something on the face of the statute putting it beyond doubt that the Legislature meant it to operate retrospectively. And although the words of the statute may be broad enough in their literal extent to comprehend existing cases they must yet be construed as applicable only to cases that may thereafter arise, unless a contrary intention is unequivocally expressed therein.’ ” *Crigler’s Comm’e v. Alexander’s Ex’r.*, 74 Va., 677.

The same question was considered by the Supreme Court of Mississippi:

“It is not sufficient that certain words of the statutes may justify the application of the language. The language must be imperative; in other words, we must be able to say that it admits of no other construction.” *Green v. Anderson & H.*, 39 Miss., 363.

The Supreme Court of Minnesota say:

“Laws are not to be construed retrospectively, or to have a retrospective effect, unless it shall clearly appear that it was so intended by the enacting body, and unless such construction is absolutely necessary to give meaning to the language used.” *Brown v. Hughes*, 89 Minn., 150.

The Supreme Court of Ohio uses this language with reference to acts of this character:

“We are now as we were then, unable to find anything in the act to indicate that the Legislature intended the provisions of the act to become effective at a time other than that declared. The different dates could not have resulted from inadvertance.” *State, ex rel, v. Roney*, 82 O. S., 376, 382, 383, 384.

I cite without quoting the case of *State, ex rel, v. Dircks*, 211 Mo., 596. Numerous other cases have been examined and could

1912.]

Railway v. Edmondson.

be cited. They are collected under Sections 642 and 643 of Lewis' Sutherland's Statutory Construction, and are all to the same effect.

The weight of authority therefore is, that a statute is to be construed as having a prospective effect, unless the language clearly and expressly states that it shall have a retrospective effect.

The question then is presented as to whether or not the Legislature intended that the Tax Commission should correct or make additions to the duplicates of the auditors of all the counties of the state after July 1st, 1910, or whether it should have and exercise all the power theretofore exercised by county auditors.

There is no provision in the act requiring the auditors of the various counties to report to the Tax Commission the state of the duplicate for the year 1911 and prior to that time. The Tax Commission would have no knowledge of such duplicate, and while the commission is given authority to investigate, the time in which such investigation could be made was so short that it is evident that the Legislature intended that the powers given to the Tax Commission of Ohio should operate only with reference to its own record and only with reference to returns made under the law in question.

The duplicate of the auditor of Hamilton county was made prior to June 27th, 1910, and was of a date prior to the passage of the Tax Commission.

Therefore, the temporary order heretofore granted will be dissolved and plaintiff's petition dismissed at its costs.

and he was duly appointed the executor under said will. On September 14, 1889, the probate court refused to probate the last will written by Greenwald, and not long thereafter Greenwald was sentenced to the Ohio penitentiary for forgery, and that ended his interest in this estate. R. M. Campbell gave bond as executor, and took possession of all the estate of Drusilla Akins, deceased.

He followed the biblical command to "Make to yourselves friends by means of the mannon of unrighteousness." The neighbors and friends of the Akins were paid liberally for boarding and for their kindnesses and attention shown to the Akins during their lives. The doctor, the undertaker, and others, as well as the attorneys at law, who were interested in the proceedings, were paid large sums of money, and the executor was making himself a general good fellow with the crowd on the Akins' estate. Because there were no children the estate was regarded as kind of a free pie. Everybody in the crowd was invited to have a slice, except Greenwald, who was on the outside, and was probably by the time this matter got safely under way, in jail or the penitentiary. The only heirs of Drusilla Akins were two sisters, Eliza Metcalf and Sarah Tyron. The executor, during this time, appears to have had the two sisters in his crowd, and they seem to have been pleased at the way things were going. It was anything to beat Lamertine Greenwald with them. Now, recently, the case has been dug up by someone, probably Greenwald, and the executor is called upon to give an account of his stewardship.

Without writing too long an opinion in this matter, it appears to the court that the referee last sight of the issues or what he was to hear and determine in this case. The matter was for hearing upon the final account of the executor, and the exceptions filed thereto. The evidence and the report of the referee should have been confined to these matters. The first partial account by the executor had been filed in the probate court, approved and settled over twenty years ago, and no exceptions of any kind were ever filed to this account. The referee, however, opens up this account, and makes a number of findings against the allowance of certain claims therein.

1912.]

In re Campbell, Executor.

The law of Ohio provides that upon every settlement of an account by an executor all his former accounts may be so far opened up as to correct any mistake or error therein; excepting that any matter of dispute between two parties which had been previously heard and determined by the court can not again be brought into question. Section 10835, General Code.

The law of Ohio further provides, "When an account is settled in the absence of the person adversely interested, and without actual notice to him, it may be opened on his filing exceptions to the account within eight months thereafter." You will note that the law provides that the account "may be opened on his filing exceptions." It is not claimed by any one that there was any error or mistake in the first partial account. It is only contended that the claims of R. C. Kinnaman, \$238.40, W. C. Frazee, \$518.90, and J. B. Britton, \$538.96, and several others, should not have been allowed and paid out of the funds of this estate as just and lawful claims. A mistake is defined as some unintentional act, omission or error. The allowance of these claims and the payment of them was, from all appearances, intentional, and not an error or mistake. The items were all set out in this first partial account, and the interested parties in this estate had notice of this for over twenty years. And without ever filing exceptions to any of these items, the referee was called upon and undertook to open up this first partial account and considered a number of the claims that were allowed and paid and in his report disallows them. He went beyond his authority. It appears that the probate judge, in his finding, did the same thing, and the referee followed the same course.

This first partial account had been on file, approved and settled October 5, 1891, by E. Finger, then probate judge, and the heirs and interested parties in this estate of Drusilla Akins were bound to "give attention to this business" and act within the law if they desired to contest any of the claims set out in the first partial account. "It is only where error or mistake in one account has intervened, that the court, on the filing of a subsequent one, can correct such mistake or error." *Campbell v. McCormack*, 1 C. C., 504.

“When an individual is fully advised of his rights and fully advised that these rights have been invaded or denied him, it becomes his duty to avail himself of the remedy the law affords within the time provided for such remedy.” *Crawford v. Ziegler*, 84 Ohio St., 224, 232.

In *In re Leidigh*, 15 Dec., 193, 195, Judge Dirlam of Richland county held in an able opinion that “Upon proper exceptions all settlements may be opened up for fraud, mistake or error.” Yet, in that case, Judge Dirlam said “I shall confine myself to those matters that are excepted to by the exceptors.” This is the proper practice to pursue, as a general rule, and it was a mistake for the referee to consider any of the claims allowed and paid and set forth in this first partial account settled over twenty years ago.

The exceptions filed by the executor to the referee’s finding of facts and conclusions of law on all matters settled and set forth in the first partial account are sustained. “An exception is an objection taken to a decision of the court upon a matter of law.” Section 11559, General Code.

The court, therefore, finds that the referee erred in law in opening up the first partial account, without any exceptions filed to the same, this account having been filed by the executor on September 15, 1891, and having been approved and settled by the probate court upon October 5, 1891.

The final account of the executor and the exceptions thereto was all that the referee should have heard. In his final account the executor charges himself as follows:

April 13, 1892, sale of C. Z. Hughes notes .....	\$1100.00
Balance on second note .....	50.00
	<hr/>
Total .....	\$1150.00

The executor asks credits as follows:

Sept. 15, 1891, by amount overpaid as per former settlement .....	\$ 98.36
Jan. 9, 1892, T. C. Harvey, county treasurer .....	18.97

1912.]

In re Campbell, Executor.

April 13, 1892, J. B. Brinton, balance account .....	278.96
July 10, 1892, T. C. Harvey, county treasurer .....	18.27
Dec. 8, 1892, Jacob Saal, county treasurer .....	11.12
Dec. 12, 1892, H. H. Brubaker, on account .....	50.00
Feb. 18, 1893, H. H. Brubaker, balance on account ...	250.00
July 21, 1893, Jacob Saal, county treasurer .....	10.72
July 25, 1893, Campbell & Grosscup, account .....	25.00
May 9, 1894, Sarah Tyron, on distribution .....	75.00
May 18, 1894, R. M. Campbell, on account .....	150.00
May 19, 1894, Eliza Metcalf, on distribution .....	75.00
Executor's commission .....	23.00
Total .....	\$1084.40
Total receipts .....	\$1150.00
Total credits .....	1084.40
Balance on hand .....	\$ 65.50

To this account exceptions were filed on April 30, in substance, as follows: First. Executor does not account for the personal property as listed in schedule D of the inventory. Second. Excepts to the account which executor charges himself in sale of C. Z. Hughes notes. Third. Excepts because executor does not charge himself with interest on said trust fund. Fourth. Excepts to all the credits in the final account, generally and specifically, because it is said they accrued more than ten years prior to rendering said final account.

The referee finds that the executor sold household goods to the amount of \$45, and did not in any of his accounts charge himself with the \$45.

The referee finds that on April 12, 1892, there remained due and unpaid on the second of the C. Z. Hughes notes the sum of \$61.72, and the present worth of the remaining nine notes against Hughes was \$1,467.08, making a total due on the Hughes notes of \$1,528.80. These notes were secured by first mortgage on property worth the amount, and the referee finds

that the executor had no power in law to sell these notes, as he claims to have done by the order of the probate court.

The \$1,528.80 on the Hughes notes plus the \$45 from the sale of the household goods, makes a total credit, with which the executor should have charged himself, in the sum of \$1,573.80. This finding, by the referee, is approved, and the exceptions thereto are overruled.

Each and every one of the items of credit asked for by the executor in his final account are excepted to because it is claimed they accrued more than ten years prior to the rendering of this final account. Section 10606, General Code, provides that an executor shall render an account within twelve months after his appointment, and every twelve months thereafter, and at such other times as the court requires, until the estate is wholly settled. A final account was not ordered or required by the court until this final account that is now in question, and it appears that the ten years' limitation (Section 11226, General Code), does not apply. If the executor had refused to file a final account and plead the statute of limitations, it would be more in line with reason. The statute of limitations is not applicable to defeat the lawful and proper disbursements made by the executor out of the funds in his hands more than twenty years ago. To make such a holding would appear like a creditor suing the maker of a note upon which partial payments had been made and contending that because the note was not paid within six years after due, that the credits should be disallowed, and the entire note collected.

The referee, in his finding, reports that the following credits should be allowed, to-wit:

T. C. Harvey, county treasurer .....	\$ 18.97
T. C. Harvey, county treasurer .....	18.27
Jacob Saal, county treasurer .....	11.12
Jacob Saal, county treasurer .....	10.72
Sarah Tryon, on distribution .....	75.00
Eliza Metcalf, on distribution .....	75.00
On attorney fee to R. M. Campbell .....	100.00
<hr/>	
Total .....	\$ 309.08



1912.]

In re Campbell, Executor.

The referee, in his finding, reports that the following credits should not be allowed, to-wit:

Amount overpaid on former account .....	\$ 98.36
J. B. Brinton, balance account .....	278.96
H. H. Brubaker, account .....	300.00
Campbell & Grosscup, account .....	25.00
R. M. Campbell, personal account .....	150.00
Executor's commission .....	23.00

This leaves the account standing, as reported by the referee, as follows, to-wit:

Total charges against the executor .....	\$1573.80
Total credits allowed to the executor .....	309.08

Balance due from the executor .....	\$1264.72
-------------------------------------	-----------

On this amount interest is allowed at 6 per cent. from September 14, 1891, to April 29, 1912, the first day of this term of court. The interest is computed for twenty years, seven months and fifteen days, and amounts to \$1,465.08.

Total amount of principal and interest, \$2,729.80.

The fund is thus more than doubled by the interest, and the court does not double the \$45 for household goods and then add interest on the amount thus doubled, because it does not appear from the evidence that the household goods were disposed of for the executor's own benefit, any more than the rest of the estate.

Judgment is entered against the executor for the amount of \$2,729.80, and all costs to date, including the fee of J. F. Henderson of \$65 for his services as referee, and a fee of \$35 for the stenographer, James E. Potts.

**COMPENSATION FOR THE PRIVILEGE OF LAYING GAS  
PIPES IN THE STREETS.**

Common Pleas Court of Franklin County.

CITY OF COLUMBUS V. FEDERAL GAS & FUEL CO.

Decided, December 15, 1910.

*Municipal Corporations—Power of, to Contract for the Use of Streets—  
Gas Company Estopped from Disputing Validity of Ordinance Un-  
der Which it Has Long Operated—Sections 9320 and 10128.*

1. A municipality may, in its propriety character, make a contract with a gas company, granting to such company the right to use the city streets for the purpose of laying pipes for the purpose of distribution of gas to consumers, and providing a consideration for such use.
2. A gas company which has accepted several ordinances granting it the right to lay its pipes in the streets, and has so laid its pipes and used them for a long period, is estopped from questioning the validity of the ordinances under which it has been operating; nor can it successfully resist, as unreasonable, or as an unconstitutional taking of its property without due process of law, the collection by the municipality of a consideration of ten per cent. of its sales of gas as provided in its contract for the use of the streets.

*E. L. Weinland, City Solicitor, for plaintiff.*

*Williams, Williams, Taylor & Nash, contra.*

KINKEAD, J.

The questions presented by the demurrer to the several defenses in the answer, except that of estoppel, are the same as were those raised by demurrer to the amended petition and which were decided by my brother Rogers of this court on demurrer to the petition [10 N.P.(N.S.), 305].

Judge Rogers has passed upon the validity of the ordinances and the contract. The rule being that the decision of one judge is controlling of questions raised before another, this branch of the court will follow the ruling made on the demurrer to the petition, unless it should be discovered that some error had been

1912.]

Columbus v. Gas Company.

made, when the two judges will consider the matter and arrive at a conclusion. I have carefully considered this case, and all the briefs submitted, and have had several consultations with Judge Rogers and we both agree upon the conclusion made herein.

The important question first to be determined is the power or right of the municipality to grant permission to the gas company to use its streets for laying the pipes for the transportation of gas to its customers. Looking to the decisions of our court of last resort, nothing definite is found bearing on the power of the city. In *Columbus v. Gas Co.*, 76 Ohio St., 309, the decision was made to rest upon the provisions of Section 3550, Revised Statutes (General Code, 9320). Counsel for both sides differentiate that case from this, on the ground that it related to an artificial gas company. The court based its conclusions upon the provisions of Section 3550, Revised Statutes (General Code, 9320), which makes the consent of the municipal authorities a condition precedent to the use of streets for such companies. The court held the passage of an ordinance, and its acceptance by the company, to constitute a valid contract between the parties.

The opinion of the court in *Circleville L. & P. Co. v. Gas Co.*, 69 Ohio St., 259, 269, is to the effect that Section 3551, Revised Statutes (General Code, 9324), a part of the acts relating to such companies, meant artificial and not natural gas. The fact that Section 2491, Revised Statutes (General Code, 3994), was amended by inserting natural is advanced by the court as an argument that Section 3551, Revised Statutes, did not embrace natural gas companies.

In *East Ohio Gas Co. v. Akron*, 81 Ohio St., 33, the question depended somewhat upon the nature of the franchise or privilege obtained by the gas company from the city, but the court had no occasion to go beyond the contract. It said that whether a contract for the privilege of entering the streets was necessary, or whether the city was competent to make it, was immaterial. It was held without regard to any question of statutory power authorizing the city to make the contract, that the ordinance giving consent to the natural gas company and its acceptance in

writing by the company constitutes a contract, and the rights of the parties thereunder are to be determined by the contract itself.

There is no doubt but that consent of the city to laying pipes in the streets is necessary even without specific provision to this effect by statute. It has general supervision over the streets in its private and proprietary character. In the exercise of this duty and right it may as a general proposition make a contract with a gas company, which, if accepted, becomes a valid and binding contract, binding on both parties. A company voluntarily entering into such a contract for its own benefit should not be heard to question the powers of the city. A city is not regulating the gas company by virtue of its police power nor by way of a license. It is granting the company valuable incorporeal property rights, in return for which the gas company agrees to pay the amount stipulated in the contract.

The decision of this case may rest upon this ground as sanctioned by *Columbus v. Gas Co., supra*, and *East Ohio Gas Co. v. Akron, supra*. In contemplation of the parties the amount fixed by the contract to be paid by the gas company to the city must be presumed to be the reasonable value of the rights and privileges granted, and conclusive upon the parties.

But I am of the opinion that brother Rogers of this court has solved the problem by holding as he did in overruling the demurrer to the petition, that the matter comes within the provisions of Sections 10128 *et seq.*, General Code.

These provisions confer the right of eminent domain on companies organized for the purpose, among other things, of the transportation of natural gas, petroleum, water or electricity, through tubing, pipes or conduits. Such appropriation is to be made in accordance with the law to owners of private property appropriated to the use of corporations. But when it is desired to go into the highways in rural districts or in streets of a city so far as the rights of the public are concerned, the county commissioners, and the councils of municipal corporations as to streets and alleys in their respective jurisdictions, subject to such regulation and restrictions as they prescribe, may grant

1912.]

Columbus v. Gas Company.

to such companies the right to lay such tubing, pipes, conduits, poles and wires therein.

It may be contended that these statutes were enacted solely for what are commonly understood to be pipe line companies organized for transportation purposes only; that they were not designed to apply to companies organized for the purpose of furnishing natural gas to the people of cities. No doubt that was what prompted this legislation. But it is well understood that the scope of the operation or applicability of a statute is not limited or prescribed by the object or purpose prompting its enactment.

A statute may include by inference a case not originally contemplated, when it deals with a genus and a thing which afterward comes into existence is a species thereof, and the language of the statute will generally be extended to the new species, although it was not known and could not have been contemplated by the Legislature when the act was passed. 36 Cyc., 1113.

The defendant company was organized for the purpose of transporting natural gas to its patrons. It does not obtain its gas within the city, but transports it from places distant therefrom. Judge Rogers has construed the last clause of Section 10129, General Code, as contemplating more than one continuous pipe in or through a municipality. The right of eminent domain is not extended to more than one line. If more is to be built, then the council of the city must give its consent.

If these provisions may properly be applied to cases like this, it is clear that the municipality had the right to make such bargain for the use of its streets as it deemed best.

The company desiring to lay its pipes in the streets for the transportation of gas to its customers, accepted the first, second and third ordinances, without any objections whatever thereto, and has continuously since used and enjoyed the privileges and benefits derived therefrom.

No objection is raised to the validity of the ordinances or contract until the city demands the performance of that part which requires the gas company to pay the 10 per centum of its receipts on gas sold by it.

It now raises the technical objection that the first ordinance is illegal and void, because the formality required by the then existing law to the effect that it was never recommended, ratified or approved by the board of public works, was not complied with. The claim is not only groundless in reason and fact, but the question was directly passed on by my brother Dillon in *Columbus v. Gas & Fuel Co.*, 2 N.P.(N.S.), 277, wherein it was held by this court that the subsequent ordinances corrected any defect in the first. Even if the first was invalid, a valid contract was made by the written acceptance of the subsequent ordinances, according to the decisions of the Supreme Court before cited.

The gas company is estopped by its conduct from questioning the validity of the ordinance or contract upon any ground whatever. It matters not whether any of the statutes discussed clearly cover the case, because the company by its acts is in no position to relieve itself by any claim of want of power in the city.

The company accepted all three ordinances in writing; it has done all the things contemplated thereby, constructed its pipe lines carrying gas to its customers, the people of the city, with whose legal representatives, servants and agents, and for whose benefit, it made the contract; it has been continuously operating thereunder, obtaining all the benefits and emoluments derived therefrom. Its pipes are now in the streets. It has not paid the city the money it promised to pay by its contract, and now seeks to have that part of the contract annulled for the alleged invalidity of the ordinances and of the contract. Acceptance of the valuable rights given it by the city and their continuous enjoyment for eleven years effectually estops defendant from questioning the right or power of the city to make the contract.

The rule is well settled in this state that a property owner who invokes the action of a municipality to improve a street for his benefit, and the street is improved, is estopped from thereafter seeking to have the law under which the improvement was made declared unconstitutional to evade payment of his part of the assessment.

1912.]

Columbus v. Gas Company.

His act of invoking the operation of the statutes constitutes a waiver of its invalidity. So, in this case, it may be held by analogy that the act of the gas company in invoking the action of the city to pass the ordinance, its acceptance and the possession and use of the streets, must be held to be a waiver of any want of power or invalidity of the ordinance, and in good conscience and equity to estop it from now raising either irregularities in the passage of the ordinance, or the unconstitutionality thereof.

This is by no means a new proposition. The principle has been applied in various forms. Corporations organized under an unconstitutional statute which proceed to do business and receive benefits under it can not be heard to allege that such statute is unconstitutional. 8 Cyc., 793.

Those who procure the enactment of a statute, acquiesce in, ratify, or approve of it, or receive benefits under it, may become estopped from denying its constitutionality. 8 Cyc., 794. See *Treasurer v. Martin*, 50 Ohio St., 197.

The gas company sought and obtained this ordinance; this rule applies to it, and the decision of the demurrer may rest entirely upon this ground.

The defendant has pleaded that the city is estopped from claiming compensation under Clause 9 of the ordinance by reason of an action brought by it wherein it alleged that the provisions of said Section 9 were contrary to public policy, denied the right and liberty of contract, and asked judgment of the court thereon.

Defendant further answering says that, relying upon the said acts of the said city, it continued to furnish gas to the inhabitants of the city of Columbus, Ohio, and to expend large sums of money in the improvement of its plant, and in the construction of additional lines of pipe in the said city of Columbus, which it would not have done if it had known that the city of Columbus would insist upon payment of said 10 per cent. pretended to be provided for by said pretended provisions of said pretended Section 9 of said ordinance.

The gas company thereupon insists that the city is estopped from asserting any claim against this defendant by reason of that action.

The demurrer of the city to this alleged plea of estoppel is sustained, because it does not set up the fact that any judgment was rendered in that action. Having decided this branch of the demurrer on the facts or want of facts stated in the answer, the court is justified in stating that an examination has been made of the printed record in the case above referred to by the gas company filed in the Supreme Court, as well as of the decision of Judge Dillon in *Columbus v. Gas & Fuel Co.*, *supra*. It strengthens the view herein expressed that the company ought to be estopped from questioning the validity of the ordinances. It appears that the gas company set up defenses to the action by the city to deprive it from its right to use the streets in which it expressly relied on the validity of the ordinances here claimed to be invalid, in order to then support its claim under them to the use of the streets, averring its written acceptance of all of them. It set forth the various acts in order to show the validity of the ordinance to sustain their right to the privileges. It avers that the gas company had acquired properties producing large quantities of gas, and in reliance in good faith upon the validity of the ordinance passed May 29, 1899, it had expended large sums of money in the development of its property and in laying its pipes; that between July 31, 1899, and April 3, 1900, the dates of the passage of the ordinances (this includes the one now complained of as not having been recommended by the board of public works), in pursuit of the purpose of carrying out the terms and conditions of said ordinances imposed by the terms thereof and relying in good faith upon the validity of said ordinances, it has made large expenditures of money.

Expenditures of money alleged to have been made by the company at different times are as follows:

(?)	(?)	\$ 68598.42
Between May, 1899, to July, 1899.....		33233.73
Between July 31, 1899, to April 3, 1900 .....		337534.50
Between April, 1900, and April 14, 1903.....		116322.74
Subsequent to April 3, 1900.....		108904.30
		<hr/>
		\$664593.69



1912.]

Columbus v. Gas Company.

It claimed that to take the privileges away from it conferred by the ordinances would result in a destruction and loss of its property amounting to more than \$500,000.

Because of the facts alleged in its answer it is claimed that the city is estopped from claiming the right to have the ordinances, or any of them, declared illegal or invalid.

If, therefore, the gas company had set forth all the facts concerning the alleged estoppel, it would have shown that this court in that case had given judgment sustaining the ordinances and in favor of the contentions of the gas company.

Coming back to the technical objections made to the ordinances and contract, it may be observed that the formalities required by law for the passage of ordinances and execution of contracts are designed to safeguard the rights of the public and to give security to rights acquired by those dealing with the city. These formalities, and the fact that the municipality is a public corporate entity, whose powers are circumscribed by constitutional and statutory law, requires to this extent that the court shall view contracts made by it with individuals in a different light than it does ordinary contracts between individuals. Outside these considerations, however, the same principles of honesty and consistency must be observed and applied especially to the conduct of the individual or corporation dealing with the municipality. The common notion is that men who make contracts should keep and perform them even if the bargain is a bad one. If it turns out to be unusually burdensome, persons governed by the true sense of justice and fairness may and should modify their contracts which unjustly burden the one or the other. Municipalities should be actuated by the same principles.

The powers conferred upon the municipality are designed to be for the benefit of the people whom it represents as well as to prescribe the limitations to which those dealing with it must conform for their own protection.

The general policy is that the municipality may regulate by a license and exact such fees as are commensurate with the reasonable expense of regulation and supervision. The city per-

forms this duty by an ordinance and the issuance of a license paper upon payment of the fee.

But the duty of the city in respect to the streets is an altogether different matter. Streets are part of the real property belonging to the city either as a fee or an easement. Acting under the statutes prescribing its powers respecting its streets the city is in the position of a proprietor or owner, and may make such bargains for their use by gas companies and other public service corporations as in its judgment it deems best within its powers. It follows from this premise that it is not limited to an exaction prescribed by mere license regulation, but may make bargains with public service corporations for their use analogous to those made by individuals respecting their lands. Contracts made by the city within its powers for use of its streets must be construed as are ordinary contracts, and corporations or individuals must not be allowed to break them upon technical grounds or by resort to such constitutional arguments as are made in this case by the gas company.

The claim made that the amount of ten per cent. on the sales of gas required to be paid by the gas company is unreasonable, because the company is required to pay all expenses of replacing streets torn up to put in pipes, that no other compensation can be required, and for that reason the ordinance is unconstitutional, is answered in the negative by the reasons already advanced, viz., that the 10 per centum is exacted for the taking of the streets for use by the company in which to carry on its business; that the compensation to be paid being a pure matter of agreement, the parties must stand by their contract.

The claim of defendant that the exaction of the 10 per centum is unconstitutional under the United States Constitution as taking the property of the gas company without due process of law is answered in the negative by the same argument.

The judgment of the court is that the demurrer to second, third, fourth, fifth, sixth, seventh, eighth, and ninth defenses is sustained. This leaves nothing in the answer in the way of a defense.

The unauthorized form of denial contained in the so-called first defense is disregarded. The material facts necessary to a

1912.]

Publishing Co. v. Express Co.

conclusion by the court are admitted by the pleadings as they now stand, and final judgment may as well be entered upon the pleadings.

The decision of the court is a final conclusion of the right to recover the percentage and of the right to an accounting.

---

**JURISDICTION OVER CLASSIFICATIONS ESTABLISHED  
BY CARRIERS.**

Common Pleas Court of Hancock County.

**SOCIALIST CO-OPERATIVE PUBLISHING CO. v. AMERICAN EXPRESS  
CO. ET AL. \***

Decided, September Term, 1911.

*Carriers—Classification of Merchandise Shipped by Express—Rates on  
Printed Sheets Shipped to Newspapers in Which They Are to be  
Incorporated—Sections 614-1 et seq.*

1. Printed sheets issued in one city for incorporation in sundry newspapers published in other cities and shipped thereto by express, do not fall within the classification "auxiliary" as used in the schedule of the defendant company relating to newspapers.
2. In the absence of a specific classification for such sheets they must fall under the general classification covering publications not registered as second-class matter.
3. But the matter of discrimination in classification or of rates for interstate transportation is a question for determination by the Interstate Commerce Commission, and for interstate transportation by the Public Service Commission of Ohio; and the courts are without original jurisdiction with reference thereto.

*George H. Phelps*, for plaintiff, cited and commented upon *Scofield v. Railway*, 43 Ohio St., 571; *State v. Railway*, 47 Ohio St., 130; *Texas & P. Ry. v. Oil Co.*, 204 U. S., 426; *Abilene Cotton Oil Co. v. Railway*, 38 Tex. Civ. App., 366; *Gentsch v. State*, 71 Ohio St., 151; *Palmer v. Tingle*, 55 Ohio St., 423;

---

\* Affirmed by the Circuit Court on appeal upon the ground set forth in the third paragraph of the syllabus.

Western Union Tel. Co. v. Publishing Co., 181 U. S., 92; High, Injunctions, Section 31; Brown's Appeal, 66 Pa. St., 155; Pomeroy, Equity, Section 281.

*Dunn & Cole, contra.*

DUNCAN, J.

The plaintiff is a corporation located at Findlay, Ohio, and is the printer of weekly newspapers for local editors and publishers located elsewhere, at various cities and towns in the United States, and transports said newspapers to them by express. The defendant express company is a joint stock company engaged in intrastate and interstate transportation of commodities for hire, and, as such, is a common carrier, and has an office in said city with the defendant, Shaler, as agent in charge. Said express company has filed with the Interstate Commerce Commission as required by an act of Congress in that behalf and with the Public Service Commission of Ohio as required by an act of the General Assembly of this state and has published and promulgated its schedule of rates and classification of commodities for transportation for the information of the public as provided by both of said acts, and the same is posted in its said office.

Up to this time the plaintiff's printed matter, viz., completed weekly newspapers printed in Findlay for local editors located elsewhere, issued from and published at other cities and not registered in the United States Post Office as second-class matter, have been classified for transportation and express charges under the head of classification 20, N. Art. 10, as follows: "*Newspapers—Auxiliary, Patent Insides, Newspaper Supplements containing reading matter or illustrations, and Reading Matter Plates, or Plates of Pictures or Drawings illustrating reading matter.*" The plaintiff claims this classification is proper and desires to have the same continued, and complains that the defendants now propose to change it so as to increase the rates heretofore charged. The plaintiff further claims that this increase of rates is confined to it alone, while its competitors engaged in the same business are to remain under the same classification as heretofore,

1912.]

Publishing Co. v. Express Co.

and, as a consequence, receive the same service at much less rates. The prayer is for injunction.

The defendants take issue with the plaintiff as to the proper classification of its said printed matter, and say that the classification heretofore given the same was by mistake and upon incorrect information from the plaintiff as to what the packages thereof contained. The defendants further deny that there has been any discrimination in classification or rates between the plaintiff and other shippers of like matter.

As to the controlling facts in this case there is but little, if any, controversy. The fact that the plaintiff has been given a certain classification and rate paid up to this time, does not determine the right of either party to have that classification or rate continued. The question is, was that classification right, or rather, is the classification now proposed for plaintiff's printed matter the proper classification according to such schedule? Newspapers, according to this schedule of rates, are divided into three classes: first, daily; second, other than daily, which are registered in the United States Post Office as second-class matter, when shipped by publishers or news companies; and third, auxiliary. It is not claimed that the plaintiff's papers come under either the first or second class, but it is claimed they come under the third, the clause of the classification above quoted. "*Newspapers, Auxiliary*," or "*Auxiliary newspapers*," are such printed matter as adds to, completes or in some manner supplements or aids a main publication printed and published at some other point. A help to the enterprise, as contended, is not what these words mean, but a help to the newspaper as a product. The word "*enterprise*," "*undertaking*," "*business*," or other equivalent, does not appear, nor other words of qualification giving that meaning.

The plaintiff's printed matter, then, does not fall within either of the above named classes. In fact, it is not "*newspapers*" in contemplation of this schedule, and is not specifically provided for other than as a "*publication*" under classification 20 of Article 21, as contended by the defendants, as follows: "*All publications not registered in the United States Post Office as*

second-class matter must be charged for as merchandise or Section D rates."

It is not to be determined here whether this matter ought to be specifically provided for other than as above stated, or what should be the rate to be charged for it, but whether the classification given it by the defendants is proper as the schedule now stands, and I believe it is.

The only discrimination complained of consists in the fact that a certain printing house in Fort Wayne, Indiana, was classified by the defendant express company at said city and paid rates under said Article 10, N., of classification 20, for the transportation of the same kind of matter to the plaintiff at Findlay, Ohio, during the same period the plaintiff was so classified and paid rates. There is no evidence to the effect that the defendant express company knowingly made such classification or gave such rates to said printing house, or at all after the same were denied to the plaintiff here at Findlay. If this is so, there was no discrimination of which the plaintiff can or ought to complain. If such classification and rates are continued to the Fort Wayne house or any other patron, and the plaintiff is denied them here, it is a discrimination against the plaintiff, and ought not to be permitted, but the evidence does not make a case of this kind. It is not only claimed that the plaintiff is discriminated against under this schedule, but that the schedule itself discriminates, in that a publisher of the paper is allowed a better classification and rate than one not a publisher for the same kind of matter. This may be defended as in the interest of education and allowed as in encouragement of him who is in the business. This objection is raised only in argument. The question is not made in the pleadings. However, this court has no jurisdiction of the question and has no jurisdiction of the question of discrimination already considered.

The reason is, that the plaintiff has a plain and adequate remedy at law. By an act of Congress, approved February 4, 1887, entitled, "An act to regulate commerce," as amended June 29, 1906 (34 U. S. Stat. at L., 584, *et seq.*), and again amended June 18, 1910, it is provided that the Interstate Commerce

1912.]

Publishing Co. v. Express Co.

Commission, created by the act, shall hear and determine all complaints of discrimination in classification or rates and the reasonableness of schedules on interstate transportation, and that by an act of the General Assembly of this state, Section 641-1, *et seq.*, General Code (102 O. L., 550), it is provided that the Public Service Commission of Ohio shall hear and determine all complaints of discrimination, etc., on intrastate transportation; and that jurisdiction is exclusive. This rule is laid down in *Texas & P. Ry. v. Oil Co.*, 204 U. S., 426, and followed in *Clemont v. Railway*, 153 Fed. Rep., 979, and *In re Twinbull*, 159 Fed. Rep., 281. The case involved excessive freight charges as being discriminating, unjust and unreasonable, to redress which, the court say was among the principal purposes of the act. By these acts, within the jurisdictional province of each, it is made the duty of such companies to charge only just and reasonable rates. To that end, they are required to make and publish schedules of such rates and strictly adhere to them and not change them until authorized by the commission and all unjust preferences and discriminations therein are forbidden under heavy penalty. The commission, either federal or state, is endowed with plenary administrative powers to supervise the conduct of such companies, to investigate their affairs, their accounts and their methods of dealing, and generally to enforce the provisions of the act with the purpose, among others, of establishing a schedule of reasonable rates, having a uniform application to all, changeable only in the manner set forth in the act. With this view, the rule is based upon the ground that if any rate could be held to be discriminatory, unjust or unreasonable by a court, and the collection of the same in the future enjoined, as sought here, it would come to pass that some shippers might obtain relief upon this ground through the holding of some court or other and thus obtain a preference or discrimination refused to others not parties to such action. For, if without previous action of the commission, courts take jurisdiction generally to determine the reasonableness, etc., of any rate, it would follow that, unless all courts reached the same conclusion, no uniform schedule or standard could be maintained. The stand-

ard would fluctuate and vary, dependent upon the different conclusions reached by the various courts passing upon the question, and lead to the enforcement of one rate in one jurisdiction and a different one in another, and in many cases, to one fixed by the courts, and another by the commission, in the same jurisdiction, and thus operate to destroy that uniformity and equality of rates which it was the very purpose of the act to establish. Such right in the courts is, therefore, inconsistent with the administrative power of the commission, to enforce this uniformity and equality of rates, and would render the enforcement of the act impossible.

As a further reason for the conclusion reached that the commission has exclusive original jurisdiction of such matters, a court of review of the proceedings and judgments of the commission is provided for in both of said acts, with a provision for the change or modification of the schedule in accordance with the action of the court in that behalf.

Holding these views, there will be a finding for the defendants. The temporary injunction heretofore allowed herein is dissolved, and the petition is dismissed. Judgment accordingly. Appeal bond, \$100.



1912.]

Huling v. Columbus.

**LIENS FOR FEES OF AN ATTORNEY UPON THE JUDGMENT  
RECOVERED.**

Common Pleas Court of Franklin County.

CYRUS HULING v. THE CITY OF COLUMBUS AND JOHN W.  
WALCUTT.

Decided, September 23, 1912.

*Attorney and Client—Lien may be Asserted on Judgment for Services  
Rendered—Extent of Such Lien—Mode of Trial—Right of Trial  
by Jury has not been Extended by Section 11379—But Court of  
Equity Takes Jurisdiction for All Purposes.*

1. An attorney acquires an equitable lien on the proceeds of a judgment recovered through his efforts in favor of his client, and where no agreement was entered into as to the amount of his compensation the extent of the lien so acquired will be the reasonable value of the services rendered.
2. An action to determine the amount due to an attorney on account of services in procuring a judgment in process of settlement is an equitable proceeding, properly referable to a master for report, and does not fall under Section 11379, which merely preserves the common law right of trial by jury, and does not extend to cases peculiar to a court of equity. *Gausaullus v. Pettit*, 46 Ohio St., 27, criticized.

*John E. Todd*, for plaintiff.

*J. H. Dyer* and *G. H. Stewart*, for cross-petitioners.

*Addison, Sinks & Babcock*, for Walcutt.

KINKEAD, J.

The defendant, Walcutt, obtained a judgment against the city of Columbus. Plaintiff was his attorney, and brings this action for the recovery of compensation for his services.

The petition sets forth the facts concerning the action prosecuted by Walcutt against the city of Columbus, wherein recovery was had for \$26,255.13. Two causes of action were pleaded in the petition, the first in *quantum meruit*, wherein it was claimed that the services were reasonably worth \$10,000.

The second cause sets forth a claim of Frank A. Davis, who was original counsel for Walcutt, the various facts concerning

the services rendered by Davis being alleged, it being claimed that his services were reasonably worth \$5,000, and that the claim of Davis was assigned to plaintiff.

The prayer of the petition is that the court on final hearing shall fix and determine the amount of the reasonable compensation of plaintiff at \$10,000, or such other sum as the court may deem just and proper, and decree and order that such sum so found by the court be and operate as a lien upon the fund and proceeds of the judgment and order the same to be paid out of such fund; also that the reasonable compensation of said Davis be fixed at \$5,000, or such other sum as the court deems proper, and decree and order that amount to be a lien upon the judgment.

Defendant, Walcutt, admits employment of counsel and the services rendered and claims that the services were not worth the amount claimed.

Gilbert H. Stewart, by answer and cross-petition, sets forth a similiar claim for \$1,000, and Joseph H. Dyer, as administrator of Eli P. Evans, sets forth a like claim for \$1,000.

The defendant files an affidavit of interpleader setting forth the amount of judgment against it for \$30,579.67, stating that it is ready and willing to pay the same to the clerk of this court in order that the claimants may settle their claims between themselves.

The case was referred to a master commissioner for hearing, over the objections of defendant, Walcutt, who also protested and objected to the hearing by the master and taking no part therein whatever.

The master commisioner heard the evidence and rendered his finding of facts and conclusions of law, to which exceptions are filed in this court. He found \$15,000 to be the reasonable value of the services rendered by Cyrus Huling and Frank A. Davis, and \$1,000 each to be the reasonable value of the services rendered by Gilbert H. Stewart and Eli P. Evans. The amount of money still in the hands of the city of Columbus and due upon the judgment is \$16,000.

It has not been authoritatively determined by the court of last resort in this state that an attorney has a lien on a judgment for his services. Incidentally the right to a lien was recognized

1912.]

Huling v. Columbus.

in the opinion in the cases of *Diehl v. Friester*, 37 O. S., 473, 477, and *Reece v. Kyle*, 49 O. S., 480.

In a number of states the right to such lien is recognized by statute: *Hanna v. Island Coal Co.*, 5 Ind. App., 163 (51 Am. St., 246); *Filmore v. Wells*, 16 Colo., 228 (3 Am. St., 567); *Renick v. Ludington*, 16 W. Va., 278; *Cromley v. LeDue*, 21 Minn., 412; *Goodrich v. McConald*, 112 N. Y., 157; *Reynolds v. Id.*, 10 Neb., 574; *Hurst v. Sheets*, 21 Iowa, 501; *Bang v. Culner*, 54 N. H., 327; *Baker v. Cook*, 11 Mass., 236; *Friesell v. Haule*, 18 Mo., 18; *Duber's Appeal*, 38 Pa. St., 231.

These statutes are merely declaratory of the common law (*Gist v. Hanly*, 33 Ark., 233). As stated in the opinion of the learned master in this case:

"It is now the recognized doctrine in this country, thoroughly incorporated in our jurisprudence, that an attorney is entitled to an equitable lien on a judgment recovered by him for his client, or to the recovery of which he contributed, to the extent of reasonable compensation for his services in the case."

This is called a special, or charging lien upon a judgment procured by him for his client. This right to recover for his services is called a lien, in the broad sense, although it rests merely upon the equity of the attorney to be paid for his services out of the judgment which he has obtained. The right called a lien is merely a right to ask for the intervention of the court for his protection, when there is a probability of the client depriving him of his interest in the fruits of the judgment.

The lien of an attorney upon a judgment is an equitable lien, and is upheld upon the theory that his services and skill produced it. All the decisions which recognize the rule "always speak of it as an equitable lien, right or privilege. It is not property in the thing which gives a right of action at law. It is a charge upon the thing which is protected in equity."

"The attorney's lien \* \* \* is founded in the natural equity which forbids that a party should enjoy the fruits of the cause, without satisfying the legal demands of his attorney." *Filmore v. Wells*, 10 Colo., 228 (3 Am. St., 567).

The rule was early recognized by the common law as being founded upon the plainest principles of equity and justice.

*Wilkins v. Carmichael*, 1 Doug., 104; *Baker v. St. Quentin*, 12 Wess. (A. W.), 441; *In re Vank, etc.*, 3 L. R. Ch. App., 125; *Turwin v. Gibson*, 3 Alk., 720; *Welsh v. Hale*, 1 Doug., 238; *Ex Parte*, 2 Ves., Sr., 407.

In most of the United States the rule is recognized and enforced the same as in England. The decisions extend the lien upon a judgment to the extent of reasonable compensation for services in obtaining the judgment though there is no agreement concerning the amount. The extent of the lien, in such cases, is ascertained upon the basis of a *quantum meruit*, which may be ascertained by the court, or by a referee, upon a summary application.

Alabama: *Warfield v. Campbell*, 38 Ala., 527 (82 Am. Dec., 794); *Ex parte Lehman*, 59 Ala., 631; *Moseley v. Norman*, 74 Ala., 422.

Arkansas: *Sexton v. Pike*, 8 Eng., 193; *Waters v. Grace*, 23 Ark., 118.

California: *Mansfield v. Doland*, 2 Cal., 517; *Russell v. Conway*, 11 Cal., 103.

Connecticut: *Benjamin v. Benjamin*, 17 Conn., 110; *Andrews v. Morse*, 12 Conn., 444 (31 Am. Dec., 752); *Vooke v. Thresher*, 61 Conn., 105; *Honda, Carter v. Bennett*, 6 Fla., 215.

Georgia: *McDonald v. Napier*, 14 Ga., 89.

Maine: *Newbert v. Cunningham*, 50 Me., 231; *Hobson v. Watson*, 34 Me., 20 (56 Am. Dec., 632).

New Hampshire: *Wright v. Cobleigh*, 21 N. H., 339.

New Jersey: *Barnes v. Taylor*, 30 N. J. Eq., 467.

New York: *Rooney v. S. A. R. Co.*, 18 N. Y., 368; *Coughlin v. R. R. Co.*, 71 N. Y., 443 (27 Am. Rep., 75).

Tennessee: *Garner v. Garner*, 1 Lea, 29; *Covington v. Bass*, 88 Tenn., 496.

Vermont: *Weed v. Boutelle*, 56 Vt., 570 (48 Am. Rep., 84); 4 Cyc., 1005, 1006.

By some courts the attorney, to the extent of his compensation, is deemed to be an equitable assignee of the judgment, having a lien on it when recovered. *Rooney v. R. R. Co.*, 18 N. Y., 308; *Marshall v. Mich.*, 51 N. Y., 140 (10 Am. Rep., 572); *Coughlin v. R. R. Co.*, 71 N. Y., 443 (27 Am. Rep., 75); *Wright v.*

1912.]

Huling v. Columbus.

*Wright*, 70 N. Y., 98; *Ex parte Lehman*, 59 Ala., 631; *Mosely v. Norman*, 74 Ala., 422; *Gist v. Hawley*, 33 Ark., 233.

The sole point of controversy in this case is whether the case was properly referred to a master, or whether it should have been submitted to a jury.

The procedure to enforce payment of the lien of counsel for services in procuring judgment has been in some instances by summary application in the case herein the same was rendered.

See 51 Am. St., 260, and cases cited; *Hunt v. McClanahan*, 1 Heisk., 503 (1870); or by independent bill in equity for enforcement of lien. *Dowling v. Scales*, 1 Tenn. Ch., 618.

It is insisted in some jurisdictions that such matter can not, and ought not, to be introduced into and blended with any pending suit, but that they should be settled and decided in like manner as other cases. *Strikes Case*, 1 Bland, 57, 98; *Marshall v. Couper*, 43 Md., 46, 62.

We have not undertaken the task of examining the English or American cases supporting the common law doctrine to ascertain, if possible, how the lien was enforced.

Mr. Pomeroy, in his classification of equitable remedies, treats of the class where the remedy, though equitable, yet grants *pecuniary compensation*. There are three species where the final object is the recovery of money. The class of cases wherein equity, at the end of the enforcement of a remedial equitable right, awards a sum of money is really distinguishable from that ordinary class in which the relief consists simply in the recovery of a general pecuniary judgment, to be collected by execution out of the debtor's property generally, which is purely legal.

In these cases in which the relief is not a *general pecuniary judgment*, but a decree of money is sought to be obtained and paid out of some particular fund, it is to be readily perceived that equitable intervention is *primarily* essential to the recognition and enforcement of a right in good conscience and equity, before the court may award the *final pecuniary compensation*.

In such case it is assumed that the claimant has by contract, or from some act of omission by the debtor, a lien, charge or encumbrance upon some fund belonging to the latter. It is essential that a remedial form be pursued wherein the lien or

charge may be first established, and then enforced by sequestration of the fund.

The preliminary steps, in such actions being the first essentially to be taken—being primary and paramount—are what give the cause character and distinction. Among familiar examples of this remedial species are foreclosure of liens, of mortgage, of vendor, of bailee, and we may say of an attorney. A few well known equitable actions are wholly pecuniary in their object and relief. See *Pomeroy Eq. Jur.*, Sections 112, 237; *Knapp, etc., Co. v. McCaffrey*, 178 Ill., 107 (69 Am. St., 290); *Blair v. Smith*, 114 Ind., 114 (5 Am. St., 593).

The doctrine has constantly been recognized in this state. Where facts constituting a single cause of action call for both legal and equitable relief, the method of trial is determined by the nature of the cause. In all such cases one kind of relief will be *primary* or *paramount*, and the other incidental. If the primary or paramount relief is *equitable*, and the legal merely incidental, that is, if it is necessary to determine whether plaintiff is entitled to the equitable before the legal relief can be granted, then it is an equitable action, and triable to the court. If the paramount relief is legal and the equitable relief only incidental it is a jury case. *Kinkead Code Pl.*, Section 137-4; *Ellsworth v. Holcomb*, 28 O. S., 66; *Rowland v. Entrekinn*, 27 O. S., 47; *Brundridge v. Goodlove*, 30 O. S., 374; *Chapman v. Lee*, 45 O. S., 356; *Coal Co. v. Verner*, 22 O. S., 372; *Fleming v. Kerkendall*, 31 O. S., 568; *Alsdorf v. Reed*, 45 O. S., 653. The same idea is expressed in the second paragraph of syllabus in *Wilson Improvement Co. v. Malone*, 17 O. S., 232.

And the character of the action—whether legal or equitable—is determined entirely from the facts alleged without regard to the prayer. *Gunsaulus v. Petit*, 46 O. S., 27; *Railway v. Thurston*, 44 O. S., 528; *Alsdorf v. Reed*, 45 O. S., 656; *Raymond v. Railway*, 57 O. S., 271.

In speaking of the lien of an attorney as a common law lien we have in mind the common law system of jurisprudence. It is as we have seen an equitable lien (*Fillmore v. Wells*, 10 Colo., 228). It is necessary to keep in mind the rule that the “equitable lien differs essentially from the common law lien, which is simply a right to retain possession,” etc. *Pom. Eq. Jur.*, Section 1233.

1912.]

Huling v. Columbus.

It is the well settled rule of procedure, as shown by many cases, that a court of equity is the appropriate tribunal for the enforcement of an equitable, as distinguished from a statutory or common law lien. *Vallette v. Canal Co.*, 4 McLean, 192; *Rigeley v. Inglehart*, 3 Bland., 540; *Hally Mfg. Co. v. Water Co.*, 48 Fed., 879; *Walker v. Casgrain*, 101 Mich., 604; *Smith v. Jackson*, 115 Mich., 192; *Buchan v. Sumner*, 2 Barb. Ch., 165 (47 Am. Dec., 169); *Fletcher v. Morey*, 2 Stony, 555, 565; *Kreling v. Kreling*, 118 Cal., 413; *Cairo, etc., R. R. Co. v. Fackney*, 78 Ill., 116; *Black v. Brennan*, 5 Dana, 310 (innkeeper's liens); *Knapp v. McCaffrey*, 178 Ill., 107 (69 Am. St., 290; bailee's lien); *Bank v. Tumbler Co.*, 172 Pa. St., 614 (statutory lien on stock); *Brigel v. Creed*, 65 O. S., 40 (lien of pledgee). See note to 74 Am. St. Rep., 387.

Determination of this question depends upon the nature and character of the action.

It will be remembered that there are two causes of action, consisting of separate statement of the claims of Cyrus Huling and Frank A. Davis. Were it not for this fact the claim would have been stated as but one cause.

The prayer asks that the court fix and determine the amount of the reasonable compensation at \$10,000 and declare it a lien on the judgment.

It is claimed by counsel for defendant that the action is one for money only, and refers to the prayer and the summons bearing the endorsement of "Action for money," as tending to support that contention.

It is elementary that the prayer is no part of a cause of action, and that the nature and character of a cause of action is judged by the facts stated.

It is also fundamental that the Code of Civil Procedure did not alter, change, limit or enlarge existing rights of action, and that the latter are determinable by the principles of the common law, to which resort is had, as well, for guidance in concluding upon the nature and character of a cause of action stated in a petition.

It has been axiomatic in this commonwealth that the right of trial by jury guaranteed by the Constitution was the common law right. That is, in action for the recovery of money only



(debt, covenant, trespass, case, assumpsit, conversion or trover) and those for the recovery of specific real (ejectment) or personal property (replevin) the right of trial therein is regulated by the statute providing for the same mode of trial which existed at common law.

The provisions of Sections 11379 and 11380 regulating the mode of trial of civil causes have since the enactment of the Code stood as an immutable mark of distinction between legal and equitable actions and rights and causes of action, as much as has the provision in the Constitution that the right of trial by jury shall be inviolate.

The meaning, effect and operation of this fundamental, constitutional and statutory law have been entirely clear and definite when considered in the light of the common law.

There has ever been a class of persons who look upon the civil action of the code with its essential incidents and characteristics, including mode of trial, as one to which new rights are attached beyond those affixed by the common law.

This view finds expression in pleading and practice, where a cause may be made to rest upon one theory and the evidence show another, or in a demand for the right of trial by jury in cases where relief by way of money is sought in connection with equitable relief.

Every lawyer and every judge knows that equitable and legal proceedings are essentially different from each other, in their origin, nature and object and that law and equity can not be administered in the same way, nor even in the same form, except as to the kind of pleading and action.

“Indeed, it would be matter of astonishment—if we were permitted to wonder that any man of common understanding, should have suffered the idea to enter his head, that legal and equitable proceedings could be moulded in the same form, and be measured by the same rules. Every person who has studied and understands the law as a science, knows that there is *substance* in the distinction between actions; and that those requirements, were really wise and indispensable safeguards and protections, in administering the most important as well as the most intricate of human sciences. \* \* \* \* The distinctions which mark law and equity are laid broad and deep in the nature of things.”  
*LeRoy v. Marshall*, 8 How. Pr., 373.



1912.]

Huling v. Columbus.

In the case of *Fillmore v. Wells*, 10 Colo., 228 (3 Am. St., 567), where the question involved was the nature of the remedy for the enforcement of the lien of an attorney, whether it be in law or equity, the contention on the one side being that the action should have been brought in law first to determine the contract as well as the compensation, and then institute proceedings in equity to enforce the lien. The court stated:

“The distinction between causes of action at law and in equity doubtless remains. No attempt has been made to abolish it, and any such attempt would be futile. The code merely abolishes forms of actions, substituting for the numerous common law forms, but one general method of pleading, whether at law or in equity. And unless a court of equity would, before the code, have been properly clothed with jurisdiction over the cause of action stated in the complaint before us, the action can not be maintained under the code.”

The constitutions recognized this distinction imposing upon the power of the Legislature the restriction to preserve distinct methods of enforcing legal and equitable rights. A leading *distinction* between common law actions and suits in equity consists in their different *modes of trial* (*Reubens v. Joel*, 13 N. Y., 488, 484). The Legislature could not reduce all actions to one homogeneous form, because it could only be done by abolishing trial by jury with its inseparable accompaniment, compensation in damages, or pecuniary judgment.

The warrant or excuse for thus referring to the fundamentals is by reason of the fact that expressions by learned judges of the court of highest authority in this state are brought to our attention touching the question of extension of the right of trial by jury. It is said that:

“The right of a party to trial by jury \* \* \* does not depend upon the character of the principles upon which he may base his right to relief, but upon the nature and character of the relief sought. If the relief sought is a money judgment only, and all that is required, \* \* \* it is immaterial whether his right of action is based upon what were formerly regarded as equitable, or what were regarded as legal, principles. If the relief sought is a judgment for money only, the fact that before the adoption of our reformed procedure, the proper remedy would have been a suit in equity, does not affect the right of

either party to a trial by jury upon any issue of fact made by the pleading." Minshall, J., in *Gunsaulus v. Petit*, 46 O. S., 27.

And again the court in discussing Section (5130) 11379, states:

"By this section the Legislature has exercised the power vested in it by the Constitution to extend the right of trial by jury to cases which were not so triable at the time of the adoption of that instrument. \* \* \* This section in its application to many cases ignores the distinction between actions at law and suits in equity, and extends the right of trial by jury to all actions for the recovery of money only, although the principles upon which a recovery may be had are equitable in their nature and origin, as in actions to enforce liability under equitable doctrines of contribution and subrogation." *Willson Imp. Co. v. Malone*, 78 O. S., 232; *Webb v. Stasel*, 80 O. S., 122, 126; *Lange v. Lange*, 69 O. S., 346.

It is respectfully submitted that these expressions of opinion were beside the questions of trial involved in each of the cases.

There is as much reason for construing Section 11379 in the light of the common law to determine whether jury trial was extended, as there is for the interpretation of the constitutional provision that the right of trial by jury shall be inviolate by the aid of the common law.

Indeed the rule of interpretation applied to the constitutional provision makes it imperative that we shall so construe Section 11379 as that it shall not *abridge* the right of jury trial. "This, added to the fact that the code did not abolish the *substantive distinction* between actions at law and suits in equity, aptly demonstrates that the true rule of construction is that Section 11379 was intended to do no more than to provide for jury trial in the common law causes of action precisely as they were, while Section 11380 was intended to provide the mode of trial for all equity cases as previously existing."

The word *only* was used in the statute for a clear and definite purpose; it was to mark the distinction between those cases in which equitable relief is neither asked nor essential, as well as those cases in which the relief sought in equity is merely incidental to the cause of action which itself is primarily for money

1912.]

Huling v. Columbus.

*only*. When this section was first enacted the word "*only*" did not appear, it having been inserted in the revision of 1880.

A cause wherein equitable relief sought is merely incidental is clearly distinguishable from one wherein the equitable relief prayed for is primary and paramount, and the legal relief is merely incidental.

This brings us to the point of determining whether the cause of action of plaintiff is legal or equitable.

This question is decided now by the same test and means as when separate courts administered law and equity. The one court in code procedure administers law and equity the same as did the separate courts formerly—except as causes may now be united in one action.

The petition of plaintiff, in substance, sets forth that as an attorney at law he rendered legal services in obtaining judgment; it states the fact of rendition of judgment, and shows that the same remains unpaid; it avers that Walcutt is insolvent and has no funds out of which the services may be paid other than from the judgment. Plaintiff claims a lien on the judgment for his services and seeks its enforcement against the fund.

We refer again to the cases in our own state touching the mode of trial. If the views expressed in some of them, which we have thought *dicta* is to prevail, it will have a material bearing in a case like this.

A peculiar problem is presented by the fact that the syllabus in *Gunsaulus v. Petit*, *supra*, which is regarded as the law of the case, especially states the very matter which we think is not the law, and which in fact does not state what was decided in that case. The action was by an administrator of a deceased wife against an administrator of her deceased husband to recover money which the husband received which belonged to his wife. The claim was that it was received by the husband in trust for his wife, and because of this trust feature it was claimed that it was an equitable action. It seems perfectly clear that the demand was for money only, the receipt of the money under such circumstances gave rise to an implied contract to repay it, upon which *assumpsit* would lie. Therefore there was no warrant for contending that the trust relation had the effect of constituting the cause one in equity.

In *Willson Improvement Co. v. Malone*, 78 O. S., 232, the petition sought judgment upon four causes of action for a balance of \$118,544 on a contract, the sole claim that it was appealable being based upon the fact that the items of account were numerous, and therefore an accounting was necessary. The learned judge used language to which exception is taken, and which we think was not essential to the decision, to the effect that Section 11379 (5130) "in its application to many cases ignores the distinction between actions at law and suits in equity, and extends the right of trial by jury to all actions for the recovery of money only, although the principles upon which a recovery may be had are equitable in their nature and origin, as in actions \* \* \* of contribution and subrogation." Our opinion is that the statute is so framed as to directly recognize the substantive distinction between actions at law and suits in equity, and that it does not extend the right of trial by jury, but is merely declaratory of the common law.

The true rule is stated in the case that the statute "does not, however, extend the right of trial by jury to cases calling for any form of relief peculiar to a court of equity."

In *Lange v. Lange*, 69 O. S., 346, a case which was purely one of law, a similar statement is found that "In an action for money, not requiring a decree granting equitable relief, is not appealable although the determination of the rights of the parties may involve the application of principles which are of equitable origin and nature, contribution and exoneration being mentioned as examples."

Again in *Webb v. Stasel*, 80 O. S., 122, 126, it is stated:

"As we have had frequent occasion to point out, the appealability of an action can not be determined by considering whether the principles upon which it proceeds are legal, or equitable in their origin and nature. While it is true that all cases which were triable to a jury before the adoption of the present Constitution are still so triable, the converse is not universally true."

It is then stated that Section 11379 extends the right of trial by jury to issues of fact in actions for money only, even though the action be founded upon principles which are equitable in origin and nature.

1912.]

Huling v. Columbus.

We have dwelt upon the cases and the law at length because if the opinion expressed by the individual judge, which we confidently assert to be *dictum*, should be literally applied to a case of this character, the result would be, that it was probably a mistake to have referred this case to the master.

But we insist that these expressions of opinion can not be sound unless it is meant to obliterate the inherent distinction between actions at law and suits in equity. This can not be the evident intention, because the true rule of distinction between causes within the jurisdiction of law and equity is always recognized, viz., Section 11379 does not extend the right of trial by jury to cases calling for any form of relief peculiar to a court of equity.

The answer to the claim that actions for contribution and subrogation are examples of the extension of the right of trial by jury is that these two causes of action have long been considered within the concurrent jurisdiction of law and equity, since the final reliefs are the same in form and substance as that granted under like circumstances by a judgment at law—a general pecuniary recovery—and since the primary rights and interests of the parties are generally recognized and protected by the law. *Pomeroy's Eq. Jur.*, Sections 1416-1419.

The fundamental and elementary principles stated in the beginning, as well as the authorities cited and discussed and sound reasoning and principle, fully warrant the conclusion that the right of trial by jury has not been changed or extended, but that it remains as it was under the old system, that Section 11379 merely preserves the common law right of trial by jury, that it does not extend to causes calling for relief peculiar to a court of equity; that “within the meaning of the section an action for money is an action for money *only*, unless there is sought some form of relief peculiar to courts of equity.” *Willson Imp. Co. v. Malone*, 78 O. S., 232.

This case is analagous to that of *Brigel v. Creed*, 65 O. S., 40, in which it was held that an action to foreclose the pledge of stock is not an action for a money judgment only, the object being to obtain an order for the sale of the stock, and an application of the proceeds to the payment of the amount due on the note, neither party being entitled to a jury trial.

In this case no judgment for money only is asked against Walcutt. The court is asked to find and declare an equitable lien, for the reasonable value of the plaintiff's services and to subject to its payment so much of the fund in the hands of the judgment debtor as will be sufficient to satisfy it.

The case of *Fillmore v. Wells*, 10 Colo., 228 (3 Am. St., 567), is precisely in point:

"The attorney's lien, whether under the statute or at common law, is equitable in its nature. Even the decisions in this country which confine its existence and application to the narrowest limits, always speak of it as an equitable lien, right or privilege. It is not property in the thing which gives a right of action at law. It is a charge upon the thing which is protected in equity. Courts of law may recognize it when the *res* is in possession of the lienor, and the owner is seeking to deprive him of such possession. But where the thing is not in the possession, and some affirmative action is required by the attorney, he like other lien claimants must seek relief in equity. In some instances a formal suit should be instituted; in others an application to the court rendering the judgment for the proper order would be sufficient. \* \* \* But since a court of equity is the only forum that can enforce, by proper decree, the lien rights, we are of opinion that this is one of those cases wherein such court may take and retain jurisdiction for all purposes. Having assumed jurisdiction to enforce the lien, it would be encouraging a multiplicity of suits, and in this, as in other respects, contrary to established procedure in equity, to say that the court of equity shall not determine the incidental though material questions involved."

*McKelvey's Appeal*, 108 Pa. St., 615, supports the conclusion reached here that defendant was not entitled to a jury trial. See also *Strong v. Taylor*, 82 Ala., 213.

The case of *Meek v. McCall*, 80 Ky., 371, cited by counsel for defendant, supports the views here expressed, rather than those contended for by defendant.

The finding of the court is that the plaintiff and the cross-petitioners have an equitable lien upon the judgment obtained by Walcutt against the city of Columbus; that they are entitled to payment of the reasonable value of their services out of the funds now held by the city by order of this court for the satisfaction of their claims. The report of the master as to the

1912.]

Blanton v. Adding Machine Co.

amount and the law is approved and confirmed, and the exceptions to the same are overruled. Decree and judgment may be accordingly entered.

### SERVICE ON FOREIGN CORPORATIONS.

Common Pleas Court of Hamilton County.

R. W. BLANTON V. THE BURROUGHS ADDING MACHINE  
COMPANY.

Decided, August 1, 1912.

*Summons—Service on Agent of Foreign Corporation—No Advantage  
Given Over Domestic Corporations—Section 11288.*

The agent of a foreign corporation doing business in this state may be served in any county in the state where he may be found and by process issuing out of any county in the state.

*Hollister & Hollister*, for plaintiff.

*Littleford, James, Ballard, Frost & Foster*, contra.

DICKSON, J.

This is an action upon an alleged breach of contract of employment to sell adding machines. The defendant is a foreign corporation. Service of summons was made upon F. S. Crane, at Cleveland, Cuyahoga county, through the sheriff of Hamilton county and the sheriff of Cuyahoga county. Motion is made "to dismiss the service of summons and the return," because the same were not properly made.

The question raised by the motion is: Can the defendant thus be brought to this county to defend, or must the plaintiff go to Cuyahoga county to prosecute? Section 179, General Code, is called into question. Before a foreign corporation can do business in Ohio it must obtain a certificate of admission, and before such certificate can be given, Section 179, General Code, must be complied with. This section reads as follows:

"Before granting such certificate, the Secretary of State shall require such foreign corporation to file in his office a sworn copy of its charter or certificate of incorporation, and a statement under its corporate seal setting forth the following: the amount of capital stock of the corporation, the business in which it is en-



gaged or in which it proposes to engage within this state; the proposed location of its principal place of business within this state; and the name of a person designated as provided by law, upon whom process against the corporation may be served within this state. The person so designated must have an office or place of business at the proposed location of the principal place of business of the corporation."

This law clearly provides that a person must be named upon whom process may be served within this state, but the section is silent as to where he may be served. After certificate granted the foreign corporation may do business anywhere in Ohio—may have branches anywhere in Ohio.

Section 11288 of the General Code provides:

"A summons against a corporation may be served upon the president, mayor, chairman or president of the board of directors or trustees, or other chief officer; or if its chief officer be not found in the county, upon its cashier, treasurer, secretary, clerk, or managing agent; or if none of such officers can be found, by a copy left at the office or usual place of business of the corporation with the person having charge thereof." \* \* \*

Section 11290, General Code, provides:

"When the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent."

The act governing service upon the designated agent does not tell where he shall be served.

The court is of the opinion he may be served in any county where he may be found in the state and by process issuing out of any county in the state.

If this ruling cause a hardship upon the foreign corporation, the Legislature may say clearly by amendment what it means.

The court is of the opinion that the Legislature did not intend to treat foreign corporations better than domestic corporations, and it did not intend that the defendant company could have a branch in Hamilton county and do business here, and that all who do business here with it should go to Cuyahoga county for redress.

The motion will be overruled.



1912.]

Friend v. Friend Paper Co.

**AS TO RECOVERY OF FEES BY COUNSEL FOR A RECEIVER.**

Common Pleas Court of Montgomery County.

JAMES H. FRIEND V. THE FRIEND PAPER CO.

Decided, October Term, 1912.

*Receiverships—Procedure for Recovering Compensation by Counsel—Leave to File a Separate Action Denied.*

A court having charge of a receivership will grant leave to file an intervening petition to counsel seeking to recover compensation for services rendered to the receiver, but will refuse leave to file a separate action at law against the receiver.

*Gottschall & Turner*, for the receiver.*Mattern & Brumbaugh* and *Matthews, James & Matthews*, contra.

BROWN, J.

This matter comes before the court upon the application of Williamson & Smith, a partnership engaged in the practice of law in the city of New York, for leave to file a petition against the receiver on a claim for advice and services rendered from October 19th, 1909, to September 1st, 1912, in connection with the receivership and reorganization of the Friend Paper Company, which with disbursements amounts to \$25,846.55, less cash credits \$750, balance due \$25,096.55.

The applicants state that their services were rendered the receiver in the administration of his duties as such receiver, and for services of value in disposing of the assets of said company, and in bringing into this court funds to be distributed through the receiver, which would not have otherwise been brought into court.

The applicants ask permission to file a separate suit at law against the receiver. This has been argued orally by counsel

and submitted with written memoranda furnished by counsel for the applicants and by counsel for the receiver. It is contended on behalf of the applicants that the question to be determined ultimately is whether or not the applicants were ever employed by the receiver, and that it is not a question of fixing the amount, but whether by contract the applicants are entitled to anything. It is admitted by them that this leave is addressed to the discretion of the court, but that it is a legal discretion to be exercised by established rules. Appellants counsel cites: 84 Fed. Rep., p. 917; 34 Cyc., p. 419; 32 N. J. Eq., p. 302; 111 Mass. Rep., p. 508; and contend that the case of *Olds v. Tucker et al*, 35 O. S., p. 581, and *Webb, Receiver, v. Stasel, Receiver*, 80 O. S., p. 122, are in harmony with the principle that the applicants should be permitted to have a trial by jury in a separate action.

Counsel for the receiver contend that the case of *Olds v. Tucker et al*, 35 O. S., 581, by the Supreme Court of Ohio, gives the law which must control the court in this case.

I have carefully considered all the cases cited, together with others, in determining the questions involved fairly and in accordance with the law and precedents. The citations from the Cyc. text are important only when the case cited sustained the same. The 34 Cyc., page 419, cites the case of *Palys v. Jewett, Receiver of the Erie Railway*. This was an action for damages for personal injuries by reason of the negligence of the train employes of the receiver, and Chief Justice Beasley renders a very interesting and exhaustive opinion, reviewing the English and American law upon this subject. The syllabus is:

“The application for leave to sue a receiver should be made to the court which appointed him, and the petition should, on its face, show that the petitioner has a case. The court should not allow its receiver to be harassed by a suit where, according to his own showing, the petitioner has no cause of action. The application is in effect a motion in the cause, and it has been held can not be granted in any other cause than that in which the receivership is pending. But the rule requiring leave is practically complied with, when leave is granted by a judge in vacation and the suit is afterward tried by him in term time. Such a subsequent entertainment and trial of the suit is equivalent to a direct

1912.]

Friend v. Friend Paper Co.

authorization for its institution. In a proper case the court may, after the action is brought, grant leave *nunc pro tunc*, and mere delay in entering the order, which has been regularly granted, until after the action is commenced will not require the setting aside of the summons and process, but the order when entered will take effect as of the day it was granted.

“It was not according to the course of the court of chancery to refuse liberty to try a right claimed against its receiver, unless it was perfectly clear that there was no foundation for the claim, and while it has been held that the court can not properly refuse leave to bring an action at law upon a purely legal right, when the applicant comes in asking for a trial at law and by jury, it is otherwise when the petitioner voluntarily comes into court in the receivership proceedings, asking that court to determine his rights, and generally it is considered to be a matter within the discretion of such court whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere, and the latter is usually done when the issues can be more conveniently tried in the place where the facts rise and the venue belongs. But it is held that the court should not permit its receiver to be made a party to proceedings in another court, where the result may be the dismemberment of the property which is being administered for the benefit of creditors and lienors, and that the court is not precluded by the granting of leave on an *ex parte* application from subsequently dismissing the suit upon a hearing, if the proceeding involves the disposition of the property, and remitting the party to his remedy in the receivership suit. In most cases of claims against a receiver, or the fund or property in his hands, the remedy by application in the cause is adequate. Any person having such a claim may resort to his summary remedy. The fund or property being held by the court, by its receiver, in trust for those entitled to it, or to be paid out of it, the court may administer justice to claimants without suit, upon special application, and relief may be awarded to a petitioner in this court, although the cause of action is within the jurisdiction of a court of law.”

The case was originally submitted to the vice-chancellor after trial, who decided against the plaintiff upon appeal to the court of errors and appeals by the above opinion, which recited that the parties had voluntarily accepted the equity jurisdiction, therefore the upper courts would review the facts. It was held that in such cases the proper procedure would have been by a

suit at law. This is the practice also in Ohio in all such cases sounding in tort.

The case of *American Loan & Trust Co. v. Central Vermont R. Co. et al.*, 84 Fed. Rep., 917, was an independent suit to foreclose a mortgage on the property in the hands of the receiver. This was brought as an independent suit without leave of court. This case was dismissed, but leave was granted to file an intervening petition in the receivership case, and in the syllabus the courts say "such independent suit can not be maintained except by leave of court, which will not be denied arbitrarily but only for legal unfitness for the process, when or where sought."

In *Olds v. Tucker et al.*, 35 O. S., p. 581, decided in 1880 and not since overruled or modified, the syllabus is as follows:

"Where the compensation of an attorney for professional services in securing the funds in the hands of a receiver for distribution is, by the rules governing the courts of equity, a proper charge upon the funds, application for such compensation out of the funds should be made in the action in which the receiver was appointed."

In this case the plaintiffs brought a separate suit for attorneys fees for conserving a sum of money for the benefit of the estate. The Supreme Court held that no application for a separate suit had been filed in the receivership case and the court held that this ought to have been done and permission obtained either by an independent action or upon leave of court, and cites a number of English and American cases. Judge Johnson, dissenting, agrees to the proposition, but excepts for the reason that no objection was made to the separate proceeding until after judgment had been obtained. The law is very clear that every allowance made to an attorney must be predicated upon the contract of employment.

This is an application for an allowance of attorneys fees in the matter of the administration of this trust. Counsel fees for the necessary counsel to the receiver are always part of the costs and such are to be passed upon by the judge having the case in charge. Under all the facts and law, I am of the opinion, there-

1912.]

Telephone Co. v. Telephone Co.

fore, that leave should be granted to the claimants to file an intervening petition in this case, but deny the authority to bring a separate action for the reasons above stated.

---

**FAILURE TO ENJOIN THE CARRYING ON OF BUSINESS BY  
A LOCAL TELEPHONE COMPANY.**

Common Pleas Court of Licking County.

**THE GRATIOT & BROWNSVILLE TELEPHONE COMPANY V. THE  
BROWNSVILLE FARMERS' TELEPHONE COMPANY.**

Decided, September Term, 1911.

*Telephone—Certificate from Public Utilities Commission Not Necessary for a Company Purposing to do a Private Business Only—Failure of Proof as to a Contrary Intention—Adequacy of Present Service and Pleading with Reference Thereto—Injunction—Franchises Distinguished.*

1. A certificate from the public utilities commission is not necessary to authorize a telephone company to carry on a telephone business, unless the company is seeking to exercise some license or franchise, and proof of the incorporation of a telephone company and the purchase of fifty telephone instruments and some poles, cross-arms, wire, etc., is not sufficient to sustain an allegation that the company is about to exercise a franchise and engage in the public service, as distinguished from providing private lines for the use of stockholders and others residing within a short distance.
2. An allegation by an existing telephone company that it is rendering adequate service in the field of its operation, where not supported by any evidence and traversed by the answer of the defendant, requires a judgment in favor of the defendant as to that issue.
3. It is not contempt of court for persons who have been enjoined from entering into the telephone business to communicate with each other over private lines, which are not connected with any switch-board and are not capable of serving anyone except those on each particular wire.

*Winn & Bassett*, for plaintiff.

*Fitzgibbon & Montgomery*, contra.

WICKHAM, J.

The plaintiff filed its petition in this case on the 22d day of August, 1911. It alleges that it is an Ohio corporation, and since the 1st day of September, 1904, it has been, and still is, the owner of a telephone line and plant for the furnishing of telephone service to the public; that the defendant is also an Ohio corporation incorporated about March 10, 1911, and that it is now engaged in the construction of a telephone plant and line in Licking and adjoining counties in the same territory and locality in which the line and plant of plaintiff is located, and that for the purpose of so constructing said plant and line it has purchased supplies, material and equipment; that it has erected about one hundred and fifty poles and that it has purchased about three hundred and forty telephone poles, about two hundred cross-arms and fifty telephone instruments, a switch-board and a large quantity of wire; that no wire has been strung upon the poles erected by the defendant, but that the defendant will string wires unless restrained by an order of this court; that the said proposed line of the defendant is not and never has been opened for public service and that no messages have been either sent or transmitted thereon; that the defendant has so begun the construction of its proposed telephone line without a certificate as required by Section 54 of the public utilities law, passed by the General Assembly of Ohio on the 31st day of May, 1911, and published in the Laws of Ohio, Vol. 102, page 549, *et seq.*; that the public service commission of the state has at no time made any finding or determination that the construction and operation of said proposed line by defendant was proper and necessary for the public convenience; and no such certificate of public necessity has been issued to defendant by said public service commission of Ohio. It further alleges that the defendant proposes to open its said telephone plant and line for public service and will operate the same for the public use without having obtained a certificate as required by Section 54 of the public utilities act.

1912.]

Telephone Co. v. Telephone Co.

It further alleges that it, the plaintiff, is operating a telephone line and plant in the same locality and that it is rendering adequate service to its patrons and that the plaintiff will suffer great and irreparable injury by reason of the loss of patronage if the defendant company is permitted to proceed; and it prays for an injunction restraining the defendant and its telephone line, or in any manner attempting to operate said pro-officers, agents, etc., from constructing and operating the said posed telephone line and from soliciting plaintiff's subscribers to discontinue the service of plaintiff until it shall have secured from the public service commission of Ohio a certificate of public necessity as aforesaid and as required by Section 54 of the public utilities act.

Upon the filing of this petition, this court granted a temporary injunction, as prayed for in the petition. Afterward, on the 11th day of September, 1911, the defendant company filed a motion to dissolve the temporary injunction upon the grounds: first, that the facts set forth in the petition of the plaintiff were untrue; and, second, that the court had no authority in law to grant the temporary injunction. The case was set for hearing upon a motion to dissolve the temporary injunction and by agreement of counsel representing both parties in the suit the case was submitted upon its merits.

The ground upon which the plaintiff relies for a decree of this court restraining the defendant company from constructing and operating its telephone plant is that the defendant has not secured from the public service commission of the state a certificate that the exercising of the franchise of the company is necessary to the public convenience, assuming that when the defendant's plant is constructed, if it ever be completed, it will become a public service telephone company

A determination of the merits of this case requires a construction of Section 54 of the public utilities act, which reads as follows:

“No telephone company shall exercise any permit, right, license or franchise that may have been heretofore granted but not actually exercised or that may hereafter be granted to own or



operate a plant for the furnishing of any telephone service, thereunder in any municipality or locality, where there is in operation a telephone company furnishing adequate service, unless such telephone company first secures from the commission a certificate after public hearing of all parties interested that the exercising of such license, permit, right or franchise is proper and necessary for the public convenience."

It is admitted by the defendant that it has not secured such a certificate from the public service commission. It maintains, however, that it is not required to secure such a certificate, because it is not seeking to exercise any right, license, permit or franchise; and that it is only where a company or person has a franchise for a certain purpose or purposes that it is necessary for it to secure a certificate from the public service commission.

It admits that its purpose is to serve the public, but in its answer filed in the case it denies that plaintiff company has been or is now furnishing adequate telephone service to its patrons.

It may be stated, for the purpose of clearing the view of this case, that there is no provision of law by which the public service commission may limit or restrict the right of a company as to building or constructing a telephone line or plant.

The petition in this case prays for an injunction to enjoin the defendant from constructing its plant, and the court, upon application, probably without careful consideration, granted a temporary injunction as prayed for in the petition. But the only authority which the state has seen fit to exercise over a public telephone company is to limit its right to use or exercise its franchise and to operate a plant for the furnishing of any telephone service thereunder. It does not pretend to interfere, and I think we are not going too far when we say that it could not interfere, with the construction of a telephone plant. So that the question is, in this case, whether it is necessary for the defendant to secure from the public service commission a certificate authorizing it to exercise its franchise to operate its plant.

It is claimed by counsel for the defendant that it has no right, license, permit or franchise, and therefore it does not come within the provisions of Section 54 of the act under con-



1912.]

Telephone Co. v. Telephone Co.

sideration. It is argued by counsel for the plaintiff in their brief that the defendant company has no right, license, permit or franchise to operate a public telephone plant, and it seems to me that by such argument the plaintiff's counsel argue their case out of court, if their view is adopted by the court. Contrary to the argument of counsel for both parties the court's view is that the defendant has a franchise, or may secure a franchise for the use of the public highways, if it is, in fact, a public telephone company.

Section 9170 of the General Code of Ohio provides:

“A magnetic telegraph company may construct telegraph lines, from point to point, along and upon any public road by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires; but shall not incommode the public in the use thereof.”

This section of the statutes grants to a public telegraph or telephone company a franchise to use the public highways of the state so long as they comply with its terms.

Section 9180 provides:

“Any person or persons may construct lines of electric telegraphs, from point to point, upon and along any of the public roads and highways and across any waters within the limits of this state by the erection of the necessary fixtures, including posts, piers, or abutments for sustaining the cords or wires of such lines. But they shall not be so constructed as to incommode the public in the use of the roads or highways, or endanger or injuriously interrupt the navigation of such waters. This provision shall not authorize the erection of a bridge across any waters of this state.”

This section of the statutes is broader than Section 9170, in that it includes “any person or persons” either individuals or corporations, whereas, Section 9170 is confined to corporations, while telegraph companies only are mentioned in this section of the statutes.

Section 9191 provides as follows:

“The provisions of this chapter apply also to a company organized to construct a line or lines of telephone; and every such

company shall have the powers and be subject to the restrictions herein prescribed for magnetic telegraph companies.”

The rights granted by these sections of the statutes constitute a franchise, and it is what is designated by writers on the subject as a secondary or special franchise and it is entirely distinguished from the franchise of a company to exist as a corporation.

The right to be a corporation, derived from its charter, is commonly called the primary franchise and is to be clearly distinguished from any other rights granted by the statutes.

In *Joyce on Franchises*, Section 3, we read:

“Whenever a corporation is legally formed, the right to be and exist as such and as a corporation to do the business specified and authorized in the articles, constitutes a valuable right, which has been called the ‘corporate franchise,’ as it is a grant from the sovereign power.”

Also, Section 7:

“A right granted to a corporation to construct, maintain or operate in a public highway some structure intended for public use, which except for the grant would be a trespass, is a special franchise, and when a right-of-way over a public street is granted to a corporation with leave to construct and operate a street railway thereon, the privilege is known as a special franchise.”

The author of this work in subsequent sections discusses and defines the distinction between the primary franchise, or right to be a corporation, and the secondary or special franchise of the corporation.

This distinction is also clearly expressed by our own Supreme Court in the case of *Coe v. C., P. & I. Ry. Co.*, reported in the 10 O. S., beginning on page 372. I read a paragraph found on page 385:

“The order of our inquiry next calls for an examination into the nature and character of the franchises of the corporation. It has been said, ‘the essence of a corporation consists in a capacity: 1, to have perpetual succession under a special name,

1912.]

Telephone Co. v. Telephone Co.

and in an artificial form; 2, to take and grant property, contract obligations, sue and be sued by its corporate name, as an individual; and 3, to receive and enjoy, in common, grants of privileges and immunities.'

"Each of these applies to the corporation under consideration. Under the two first is described what may be termed the franchise of the corporators, or individual members of the corporation, and under the last what may be termed the franchise of the corporation. As said in a recent case: 'A corporation is itself a franchise belonging to the members of the corporation; and a corporation, being itself a franchise, may hold other franchises, as rights and franchises of the corporation.' "

Thus we see that the right to be and exist as a corporation is a franchise belonging to the incorporators, and the rights and privileges of the company itself are the franchises of the corporation.

The next inquiry we will consider is this: Is the defendant in this case a public service corporation and does the proof show that fact? The evidence is that the company had purchased some poles, wire and switch-board; some cross-arms and fifty telephones. They had put the switch-board in place in the village of Brownville, which should be stated is an unincorporated village, and had erected some poles, but it had installed no telephones and strung no wires. The employes of the company were engaged in erecting poles and attaching cross-arms thereto when estopped by the temporary injunction. By what right the company had erected their poles along the line of the public highway does not appear from the evidence in this case.

The defendant company, as has been stated, had purchased fifty telephones. There was no evidence tending to show that they contemplated any greater number. No part of their proposed line was within any municipal corporation. They proposed to build it in the unincorporated village of Brownsville and its vicinity, and their purpose was to secure means of communication among about fifty residents of Brownsville and vicinity. There is no proof that they contemplated any long distance connection or service. It also appeared that the stockholders in the defendant company, with disaffected patrons of

the plaintiff, had discontinued the use of plaintiff's telephone and had organized a company to construct a telephone plant for their own use and convenience and for the purpose of affording them means of communicating with each other. Beyond showing those facts, the record in this case is entirely silent.

The petition of plaintiff alleges that the defendant company was about to engage in the service of the public, but the evidence in the case does not show that fact. I am aware that counsel for the defendant admitted, orally, during the trial, that the defendant was proposing to serve the public, but sometimes counsel in a case admit more than the facts warrant, and I think that may be correctly said here. I am also aware that Section 3 of the public utilities act defines a common carrier and therefore a public servitor, but I think it may be set down as a sound proposition that you can not make a private telephone line an instrument of public utility by an act of the Legislature. Whether the defendant was about to engage in the public service depends upon the nature and character of the business. I can not better express what I desire to say upon the subject than by quoting from the brief of counsel for the plaintiff, and citing some authorities set out in that brief:

"The articles of incorporation of defendant company throw no light on the question as to whether defendant is to conduct a private business or a public business. If the business is private, the public is not interested and has no control over it. A private telephone line may easily be constructed and operated.

"Defendant may, when incorporated, intend to carry on a public business, but is under no obligation, by reason of its charter, to do so. It may at any time change its intention and make its business private. It may intend when beginning the construction of its telephone plant to serve the public, but before it is completed it may make arrangements which will constitute its service a purely private business.

"To constitute the business a public business there must be a public profession of intention and ability to serve the public. Wyman, Public Serv. Corp., Section 221, says: 'It is always a question upon the whole proof in the particular case whether the proprietors of the business have done enough to give people generally the impression that they are at the disposal of the

1912.]

Telephone Co. v. Telephone Co.

public.' Again, Section 200, Wyman says: 'Even one who has acquired a virtual monopoly is not forced into public service against his will; it is only when he has held himself out in some way as ready to serve that he is bound thereafter to deal with all indiscriminately.' Again, Section 207: 'While preparation for establishing the service are going on the business should not be regarded as yet upon a public basis. Thus, where a railroad is under construction and not yet publicly open for passengers, it is not a common carrier of passengers.'"

And in *Munn v. Illinois*, 94 United States, page 113, the court say:

"This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what is without its operative effect. Looking then, to the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale more than two hundred years ago in his treatise *De Portibus Maris*, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control."

The same principle is announced by our Supreme Court in the case of *Ohio Gas Co. v. Akron*, 81 O. S., 83.

Our conclusion is, the burden being upon the plaintiff to prove the facts of its petition by a preponderance of the evidence, that the evidence in the case is not sufficient to sustain the allegation that the defendant was about to engage in the public service; that the proposed telephone system of the defendant, so far as the evidence shows, to the contrary, was merely a private telephone plant for the use of the stockholders of the defendant company.

When the case was reached for trial it was stated by counsel that they would not offer any evidence upon the question or issue of whether the plaintiff company at the time of filing the petition was rendering adequate telephone service. Counsel stated that that was a question that would properly come before the public service commission of the state, upon an application made to it by the defendant for the certificate provided for by the act; that it was not a question involved in this suit, but as we construe Section 54 of the act, it is only where there is already a telephone plant in the field in operation and it is rendering adequate telephone service a new company is required to secure the certificate from the public service commission.

The language of the act is, "No telephone company shall exercise any permit, right, license or franchise that may have been heretofore granted," etc., "where there is in operation a telephone company furnishing adequate service."

The converse of that is to be understood, we think, that if there is another telephone company in the locality pretending to serve the public and is not rendering adequate telephone service, the certificate of the commission is not required.

It was deemed important by the plaintiff to aver in its petition the fact that it was rendering adequate service in the following language:

"That continuously since said 1st day of September, 1904, to the present date the plaintiff has operated said telephone plant in sending and receiving telephone messages over its said line, and has during all of said time been engaged in the business of transmitting telephone messages as a common carrier, and during all of said time plaintiff has furnished to the public and to all persons requesting telephone service over said line *adequate service*; and has continuously operated its said plant and line during twenty-four hours of each day, and at all times has maintained its exchange open for service both day and night, and during all of said time plaintiff has furnished and maintained a complete and *adequate service* to all of the localities and communities reached by its said plant and line."

This case is submitted to the court upon a general denial of all the allegations of the petition except those that were ad-

1912.]

Telephone Co. v. Telephone Co.

mitted by counsel in advance of the trial. This fact was not admitted by the defendant. We are unable to agree with counsel at this time that that allegation has no importance in this petition. We think it is a necessary averment and being traversed by denial must be sustained by proof. There was no proof offered on this issue and upon that ground, if no other, we think the judgment in this case should be for the defendant. On that ground and upon the ground that the facts in this case do not show that the defendant company was about to engage in the public service, we dissolve the temporary injunction heretofore granted and dismiss the petition at the costs of plaintiff.

After the temporary injunction had been allowed in this case some of the stockholders of the defendant company, who had discontinued the use of plaintiff's telephones, desiring to communicate with each other by telephone, came to the city of Newark and obtained the advice of counsel whether the erection of some poles and installing of some telephones so that certain families could be enabled to communicate with each other would be a violation of the temporary injunction. They were advised by their attorney that it would not be a violation. Thereupon they proceeded to erect some poles and to string wires thereon and installed in the homes of some of the stockholders about twenty-five telephones. There were five or six telephones on each line and there were four or five lines in all. No line could communicate with any other, but the persons upon each line could only talk to a few phones constituting that separate and individual line. There was no switch-board used and no manner or means by which the telephone could be used except for the purpose of talking one neighbor with another. Upon learning these facts counsel for the plaintiff filed against the defendant company and certain others who had telephones placed in their homes and some who had assisted in the construction of the line a charge of contempt of court and that phase or branch of the case was submitted at the same time the main case was tried.

Nearly all the persons who were charged with contempt testified in the case and freely and frankly stated all the facts within their knowledge. It appeared that they are farmers and



many of them are brothers and it appears that some of the lines constructed were for the purpose of enabling one brother to talk to another, and possibly, in addition to that to some one or two of his neighbors. They all stated that they had no intention or desire to violate the order of this court; that they would not have done anything that in their opinion could have possibly been construed as a violation of the temporary injunction; that they relied on the advice of their attorney and did only what he advised them they might properly and safely do.

The court was impressed with the honesty and frankness of these defendants and believes that every word testified to by them was the truth as nearly as the testimony of witnesses can state it.

It is the opinion of the court that the defendants ought not to be held guilty of contempt of court for the reason, first, that the facts do not show that the defendants did any act or thing that was in violation of the temporary injunction; and further, under the circumstances, if there was any doubt about that this court would be inclined to resolve that doubt in favor of the defendants and discharge them from the charge of contempt of court.

We dismiss the charge of contempt against the persons named in the written charge filed. The entry in this case may show that motion for new trial is overruled with exceptions noted.



1912.]

Conklin v. Tyler.

**LOSS OF LIEN BY FAILURE TO RECORD ASSIGNMENT OF MORTGAGE.**

. Common Pleas Court of Wood County.

ELECTA CONKLIN V. ROZELL TYLER ET AL.

Decided, September, 1912.

*Assignment of Mortgages—Construction of Act Relating to Failure to Record Assignment Renders Lien Invalid as to Subsequent Purchasers Without Notice—Right of a Purchaser to Rely on the Title as it Appears of Record—Merger—Equity as Between Two Innocent Parties—Sections 8543 and 8546.*

1. Where a purchase money mortgage has been executed and delivered to the grantor of the lands conveyed, a reconveyance of the lands to him by the grantee does not cause the greater and lesser estates to meet in him and thus effect a merger, where the mortgage was not surrendered by him upon receiving the reconveyance or at any time thereafter, but had been assigned and thus passed into possession of third parties.
2. Where there has been a failure to record the assignment of a mortgage, a subsequent purchaser of the land in good faith for full value without notice of the assignment takes title free from the lien of the mortgage in the hands of the assignee.
3. Moreover, as between an innocent purchaser of land and the assignee of a mortgage the assignment of which has not been recorded, the act of negligence which caused the conflict of interest was, the failure to record the assignment, and the equity of the purchaser of the land is first in time and superior in merit.

*Earl D. Bloom, for plaintiff.*

*N. R. Harrington, contra.*

BALDWIN, J.

The plaintiff brings her action to recover judgment on several promissory notes and to foreclose two mortgages given to secure the notes. A jury being waived by the parties, the cause was submitted to the court. The pleadings raise several issues of fact, but the evidence adduced discloses little or no disputed fact. The case must turn on the solution of questions of law,

to determine which of two innocent parties must suffer a loss occasioned by a fraud practiced by another party. The facts so far as necessary to a presentation of the question are as follows:

On and prior to April 7, 1906, the defendant, Sibert, was the owner in fee of the twenty acres of land in Milton township described in the petition. On that day he sold and conveyed the land to James Williams, who made a small cash payment and gave to Sibert the note and mortgage for \$1,600 set forth in the first and second causes of action in the petition. The mortgage was duly filed for record on April 12, and was recorded April 18, 1906. On June 22, 1906, Sibert endorsed the Williams \$1,600 note in this manner, "F. M. G. Sibert. This note is held as collateral security for a certain note of \$1,200 dated June 22, 1906, and due in 6 mos. 8 per cent.," and delivered the same with the mortgage to Singer & Henderson. Sibert executed an assignment on the back of the mortgage in these words: "I hereby transfer my interest in the within mortgage to Singer & Henderson. F. M. Sibert." This assignment was not witnessed or acknowledged. At the time of said assignment and transfer, Sibert was indebted to Singer & Henderson in the sum of \$1,200, which indebtedness was at that time put in form of a promissory note made payable six months hence and bearing 8 per cent. interest, and the assignment of the Williams note and mortgage by Sibert to Singer & Henderson was made as collateral security for the payment of said \$1,200 note. The assignment of the Williams mortgage from Sibert to Singer & Henderson was not recorded until November 21, 1911, at which time it was recorded on the margin of the record of the mortgage.

Williams doubting his ability to meet the deferred payment on the land, negotiated with Sibert to take the land back, and on September 3, 1906, Williams by deed of general warranty reconveyed the land to Sibert in consideration that Sibert would surrender up the \$1,600 purchase money note and mortgage for cancellation and also to give to him, Williams, a note for \$300. Sibert then gave the \$300 note and received the conveyance, but represented that the \$1,600 note and mortgage was in a deposit box at some bank and he could not produce them

1912.]

Conklin v. Tyler.

that day but that he would get them and send them to Williams. This Sibert failed to do.

Sibert thus having the legal title to the land, with the mortgage given by Williams to him, appearing of record uncanceled and unassigned, on January 14, 1908, sold and conveyed the land by general warranty deed to the defendants, Rozell Tyler and wife, who purchased the land in good faith for full value, having no notice or knowledge that the Williams mortgage had been assigned by Sibert. Upon purchasing the land, the Tylers entered into immediate possession, which they still retain.

On February 17, 1912, Singer & Henderson transferred the Williams note and mortgage to the plaintiff, making this assignment on the back of the mortgage:

“We hereby transfer our interest in the within mortgage to Electa Conklin. Feby, 17-1912.

“Singer & Henderson.”

This assignment was not witnessed or acknowledged and was recorded on margin of mortgage record, September 14, 1912.

The only evidence touching this assignment is the testimony of the plaintiff. She says she bought this Williams note and mortgage from Singer & Henderson, and paid them \$1,250 therefor. She does not claim to have purchased the \$1,200 note given by Sibert to Singer & Henderson, but only the collateral security. This transfer was made at private sale, and there is no proof that Sibert had any knowledge of the sale, or that he consented thereto.

The \$1,200 note given by Sibert to Singer & Henderson secured by the collateral remains unpaid.

Upon these facts the plaintiff contends that she is the owner and holder of the Williams note and mortgage, and is entitled to recover thereon the principal sum of \$1,600 and interest, and that the same is a lien upon the lands described in the petition; while the defendants contend that plaintiff has no lien whatsoever on the lands.

Defendants argue that their contention is sustained upon either or all of three different grounds.

*First*, that the reconveyance of the land by Williams to Sibert effected a merger of the Williams mortgage.

If the question of merger depended solely on the facts of the transaction of reconveyance by Williams to Sibert, or upon the state of record in the recorder's office, there could be no doubt that as between Williams and Sibert the mortgage was extinguished or merged in the higher title. But the doctrine does not depend solely upon those conditions, indeed it is unaffected by compliance or non-compliance with recording acts. The first and most essential requisite of a merger is that the greater and lesser estate shall coincide and meet in one and the same person, in the same right and without any intermediate estate. In this case that element is lacking, because at the time Sibert received the reconveyance from Williams, he had assigned and pledged the mortgage to Singer & Henderson as collateral, and though he then had the legal title to the mortgage, which as between him and Williams was extinguished under the terms of reconveyance, the equitable right of Singer & Henderson as pledgees of the mortgage, Sibert did not possess, hence that equitable right—that interest, could not merge in the higher title, or be extinguished, at least so far as concerns third parties.

The view is fully sustained by the holding in *Bell v. Tenny*, 29 O. S., 240, which is quite decisive of this proposition. See also *Bank v. Mourm*, 22 Atl., 555.

The second ground advanced by defendants is, that because of the failure to record the assignment of the Williams mortgage before the Tylers acquired their title to the lands, the assignees lost their lien as against the purchasers.

Prior to the amendment of the recording act in 1888, no provision was made for recording assignments of mortgages, but by that amendment, now Section 8546, General Code, such assignments are recordable instruments. There was some purpose in making this change in the statute. The only one perceivable is that it was to afford notice, either actual or constructive, to intending purchasers as to the holder of the encumbrance—a recognition of an assignment of a mortgage as an instrument affecting title, and one necessary to be disclosed by the record if the assignee would protect his right and title to the mortgage security against subsequent *bona fide* purchasers and encumbrancers. It seems to me that such an assignment falls properly

1912.]

Conklin v. Tyler.

within the category of an "instrument in writing for the incumbrance of lands." True it is not an instrument creating the lien, but it is an instrument which supplies a necessary element to a valid mortgage lien, viz., a mortgagee in whom the lien is vested. If this be true then by positive provision of statute, the failure to record rendered the assignment invalid as to the subsequent *bona fide* purchasers. After providing for the recording of mortgages, Section 8543, General Code, makes this requirement:

"Section 8543. All other deeds and instruments of writing for the conveyance or incumbrance of lands, tenements, or hereditaments, executed agreeably to the provisions of this chapter, shall be recorded in the office of the recorder of the county in which the premises are situated, and until so recorded or filed for record, they shall be deemed fraudulent, so far as relates to a subsequent *bona fide* purchaser having, at the time of purchase, no knowledge of the existence of such former deed or instrument." (R. S., Sec. 4134.)

The determination of this question to my mind might well and safely rest upon the construction of these two sections of the code.

The Supreme Court having under consideration essentially the same question in the case of *Pinney v. Bank*, 71 O. S., 173, did not place their decision on the grounds just stated, but by a very convincing course of reasoning reached the same conclusion. I will not take time to review that case, which is familiar to interested counsel. Plaintiff's counsel argues that that case is differentiated from the case at bar because the question arose between a purchaser at judicial sale in a foreclosure of a senior mortgage and the holder by assignment, unrecorded, of a junior mortgage, the person appearing by record to be the holder of the junior mortgage having been made a party defendant in the foreclosure suit.

A purchaser at judicial sale occupies no better position than a purchaser at private sale. The doctrine of *caveat emptor* applies to him in the same manner as to a private purchaser. He may avail himself of all rights concluded by the decree under which he purchased. But the decree itself does not create the right, it is simply the legal determination deduced from the law and the facts in the particular case.

In the case of *Pinney v. Bank*, the court held that the failure to record the assignment of the junior mortgage precluded the assignee from asserting the lien of such mortgage against a *bona fide* purchaser, having no actual knowledge of the assignment of the mortgage. The fact that the original mortgagor was a party to the action, and that his rights were foreclosed in the action, does not distinguish the case from the one at bar, because the act of Sibert—by record the apparent holder of the Williams mortgage—in conveying all his interest in the property by deed of general warranty to the Tylers, was an extinguishment of all and every lien he could possibly assert, effected in the most solemn manner known to the law. And the effect is the same as though such act had been pronounced a relinquishment by judicial decree. It is said that the Tylers, being chargeable with knowledge because of the record of the Williams mortgage appearing uncanceled, were guilty of laches in failing to procure a cancellation of the mortgage by Sibert to be entered on the mortgage itself or upon the margin of the record. If they had procured such cancellation in that form under the holding in *Swartz v. Leist*, 13 Ohio St., 419, it would have extinguished the lien. Instead of pursuing that method they took the other, that of a conveyance and release of all Sibert's interest in the land, thus complying with the provisions of the Statute of Frauds, Section 8620, General Code, and as before stated employing the most effective means to divest Sibert of all estate or interest in the lands, actual or apparent.

If recording acts mean anything; if intending *bona fide* purchasers without notice of the rights or claims of others have the right to rely upon titles as they appear of record, then by every consideration of justice and right such purchaser should be protected against undisclosed claims of third parties. This conclusion is supported by reason, by the spirit of our recording acts, and by the authority of our Supreme Court in *Pinney v. Bank*, *supra*, and in obedience to that decision as well as upon principle, this proposition must be resolved in favor of the defendants, the Tylers.

This holding renders it unnecessary to consider the third proposition contended for by defendants, viz., that aside from the

1912.]

Conklin v. Tyler.

questions of merger, and failure to record the assignment, the equities of the Tylers are stronger and should prevail over the equities of the plaintiff.

This contention will be briefly considered: When the Tylers in good faith, for full value and without notice of the assignment of this Williams mortgage purchased these lands, equity would say that they should have what they bargained and paid for. Disregarding the recording act this equity would be subsequent in point of time to that of Singer & Henderson as holders of the Williams mortgage, and if the plaintiff stands in the same position as Singer & Henderson subsequent to her equity.

But the plaintiff does not occupy the same position. She does not claim to hold the mortgage as collateral, but asserts that she holds it as an original demand, acquired not only when overdue, but with the express notice to her borne on the back of the note, that the legal title was not in Singer & Henderson but in Sibert, and that the paper was only pledged to Singer & Henderson to secure another debt. She was bound to know the law that Singer & Henderson had no right to sell the collateral except at public sale after reasonable notice to Sibert. She was attempting to take a title to the paper which she was bound to know that Singer & Henderson could not confer, and it seems clear that as against all interested parties other than Singer & Henderson she had no title either legal or equitable to the paper. Not imputing to her any actual intention to defraud, yet in a legal sense she was not a purchaser in good faith. Hence no equity could arise in her favor as against the equity of the Tylers.

It seems to me that the equities of the Tylers are not only first in point of time, but superior in merit to those of the plaintiffs.

The same result would be reached by the application of the familiar equitable doctrine, that where a loss must be suffered by one of two equally innocent parties, if the act or negligence of one of the parties made possible the loss, such party must bear it. It was clearly the neglect of the plaintiff and those under whom she claims, to record this assignment, which occasioned this loss, and therefore it must be borne by the plaintiff as between her and the defendants Tyler.



The other notes and mortgage set forth in the petition are admitted by the defendants, and the right of the plaintiff to recover thereon is conceded. The only question arising thereon is one of costs—depending upon the validity of a tender made by defendant Tyler. It is conceded that on March 29, 1912, the defendants' counsel proffered to plaintiff's counsel as agent for plaintiff, in lawful money a sum sufficient to satisfy the amount of principal and interest then due on this second set of notes and mortgage. It is further conceded that the terms of the proffer or tender are set forth in the affidavit of S. R. Case offered in evidence. This affidavit in substance sets forth that the sum of \$1,718 was offered to plaintiff provided she would accept the same in full satisfaction of both mortgage liens asserted in this case and that she would enter a release and cancellation of both mortgages. The plaintiff contends that this proviso vitiates the tender; that inasmuch as the defendants admitted the validity and their liability upon the last set of notes and mortgage and denied any liability on the first, the tender to be effective should have related only to the last mortgage, and that coupling with it a requirement that the first note and mortgage should be canceled and surrendered was imposing a condition to the tender which defendants had no right to require. I do not so regard it. The fact that the plaintiff was asserting several demands does not abridge the right of defendants to make a tender in gross, in satisfaction of all. It is not essential that the tenderer should subdivide the amount tendered and state that so much is to be applied upon the several obligations asserted, or in this case for the defendants in order to avail themselves of the benefit of the tender to say, "We offer you \$1,718 in satisfaction of the notes and mortgage given by ourselves, and we tender you nothing in satisfaction of the lien of the Williams mortgage." They did the only thing that could be done by way of tender of the amount they claimed to be due the plaintiff, and having legally tendered all that was then due upon all the demands asserted in this action as hereinbefore determined, they should recover their costs from the plaintiff.

The defendants, James Williams, Charlotte A. Williams, his wife, makers, and F. M. G. Sibert, endorser of the note set forth



1912.]

Stomps v. Stewart.

in the first cause of action in the petition, are in default for answer. The plaintiff is entitled to personal judgment against them for the amount of the original debt of Sibert to Singer & Henderson, \$1,200 and interest thereon from its date to the first day of this term, and also for all the costs herein. The plaintiff is also entitled to personal judgment against the defendant, Rozell Tyler, as principal, and F. M. G. Sibert, as endorser, upon the notes set forth in the third, fourth, fifth and sixth causes of action in the petition, and to a decree foreclosing the mortgage set forth in the seventh cause of action upon failure to pay the amount of the notes secured thereby within ten days from this decree.

The mortgage set forth in the second cause of action is ordered canceled and the clerk to certify its cancellation to be entered on the margin of the record. And the defendants, the Tyler family, will recover their costs herein from the plaintiff. Judgment and decree accordingly; exceptions may be noted.

---

**REMEDY OF OWNER WHERE LEASED PREMISES HAVE  
BEEN ABANDONED.**

Common Pleas Court of Montgomery County.

GUSTAVE STOMPS V. CHARLES STEWART.

Decided, November 6, 1912.

*Landlord and Tenant—Premises Vacated Before Termination of Lease—  
Owner's Remedy an Action for Rental Rather than an Action for  
Damages. When.*

1. Knowledge on the part of a landlord of the vacation of premises before expiration of the lease, does not amount to a cancellation of the contract of lease, unless he assented thereto by some act, such as acceptance of rent from a new tenant.
2. Where no assent to the vacation was given, a petition filed by the landlord for the rental for the remainder of the term is not open to demurrer on the ground that he has thereby admitted the cancellation of the lease and, consequently, is limited in his remedy to an action for damages on account of violation of the contract of lease.

*Joseph D. Chamberlin*, for plaintiff.

*John E. Egan*, contra.

BROWN, J.

Case 34404 is an appeal in which the plaintiff, by his petition on appeal, prays judgment for \$225 and interest, for rent, in accordance with the terms of a written lease, from March 16th, 1912, to May 16th, 1912, at \$75 per month. An allegation in this petition states that, pursuant to said indenture of lease the defendant occupied the premises under said lease from the 16th day of January, 1911, until the 16th day of March, 1912, when said defendant vacated said premises without said plaintiff's consent and contrary to the terms of said indenture of lease.

A demurrer is filed by reason of this averment, the defendant claiming that by this averment the plaintiff admits the cancellation of the lease by reason of the defendant vacating the premises, and that therefore his action should be one for damages for violation of the contract of lease, and not for rent under the lease as pleaded.

The defendant claims that his position is sustained by the decision in *Rubel v. Muth*, 5 O. C. D., 176, and the decision in *James v. Allen County*, 74 O. S., 226.

In the former case the defendant, Muth, set up in the answer the repudiation of the contract, and that the acts of the plaintiff, according to the evidence, warranted this repudiation. The court charged the jury upon the idea that the suit was brought for rents and that suit could be brought and maintained month after month for rent, as though accrued on the continuing contract, not a suit for damages because of the repudiation of the contract. The circuit court held that this was error, as it clearly was; that under the facts the suit was for damages because of the repudiation. In determining that case the court cites the above case of *James v. Allen County*, 44 O. S., 226, which was a case wherein James entered into employment under a contract for a specified time, to superintend the erection of a court house, and at the end of two months he was discharged and brought suit for two months wages, and afterwards brought suit for

1912.]

Stomps v. Stewart.

wages claiming to have accrued after the two months for which he had already obtained judgment. The Supreme Court held that he should have brought a suit in the first instance for the entire damages due him by reason of the breach of the contract by the county, and added that he could not maintain the suit brought later.

Both of these decisions are good law; but let us see if they apply to the facts raised by this demurrer.

The principal question involved is whether the averment quoted from the petition indicates a forfeiture of the lease; because if the lease was canceled and forfeited on March 16th, 1912, by the defendant vacating the premises, then the suit should have been one for damages for breach of the contract, and not for rent under the terms of the contract, as indicated in the lease.

The plaintiff says in the same averment that the vacation was without his consent.

The lease was for one year, with the privilege of another year, at \$75 a month. The term began on January 13, 1911.

When a tenant for years holds over after the expiration of his lease, he becomes, at the election of the landlord, a tenant from year to year. 57 O. S., 161; 67 O. S., 250.

Where the landlord and tenant do not agree as to the amount of rent to be paid during the new term, and the tenant continues to occupy the premises, his action in remaining in possession amounts to an implied agreement to pay at the former rate. 7 N. P., 364; 11 O. C. C., 453; 60 O. S., 569; Sutherland on Damages, par. 108. See also 82 O. S., 121; Kincaid on Pleadings, Vol. 2, par. 740; 15 O. C. C., 233.

A tenant for years who holds over becomes either a trespasser or tenant at the option of the landlord. His continuance in possession makes him a tenant for another year, if the landlord insists, and he can not terminate the tenancy before the end of the year without the landlord's consent. The obligation of the tenant to pay the rent for the year in such case is not within the statute of frauds, the holding over being equivalent to a new entry. 57 O. S., 161.

In the case of *Lodge v. White*, 30 O. S., 569, there was an assignment of the lease after they were holding over from year to year, as in this case, and their obligation to pay rent to the plaintiff was implied from their possession of the premises. The landlord received rent from the new tenant; and the court held that the defendant's obligation to pay rent to the plaintiff was not founded upon the express agreement, but was only that implied by law from the privity of estate between the parties. The assignment of the lease and surrender of possession to the assignees, with the assent of the plaintiff, which was implied from the acceptance of rent from the new tenant, extinguished the privity of estate between the parties and the consequent implied liability of the defendants to pay rent.

This would seem to decide very clearly that the knowledge of the landlord of the vacation of the premises would not amount to a cancellation of the contract of lease, unless he agreed thereto by some act either of assent or implication, such as the acceptance of rent from a new tenant.

After carefully considering the question, I am forced to the conclusion that the petition is good, and that the demurrer should be overruled.

The petition in error, in case 34639, sets forth four grounds of error in substance:

1. The agreed statement of facts did not warrant the judgment.
2. Judgment should have been for the plaintiff in error.
3. The judgment rendered on June 10, 1912, was a bar to the action upon which this proceeding was prosecuted.
4. Other errors apparent in the record.

The bill of particulars in this case avers the lease and terms thereof, as in case No. 34404, the occupancy by the defendant from the 16th day of January, 1911, until April 5th, 1912, when the defendant vacated the premises without the plaintiff's consent and contrary to the terms of the lease; and praying for judgment for \$115 for the period covered by said lease. The agreed statement of facts, covering two pages of typewritten matter, is submitted and is too lengthy for copying into this de-

1912.]

Drumm v. Oil Co.

cision. Among other things it is agreed that the landlord leased the premises to a new tenant August 1st, 1912, in accordance with an understanding with the representative of the tenant Stewart. The facts, with the application of the law as above recited, would clearly warrant the judgment rendered by the justice of the peace upon the agreed statement of facts, and there is no error therein.

Therefore judgment will be awarded for the full amount in case No. 34404, and the petition in error in 34639 will be dismissed at the costs of the plaintiff in error.

### RENTAL FOR OIL AND GAS LANDS.

Common Pleas Court of Licking County.

J. P. DRUMM v. THE NORTH AMERICAN OIL & GAS COMPANY. \*

Decided, September Term, 1911.

*Oil and Gas—Liability of Lessee for Rental—Where no Well is Sunk During the First Year of the Lease.*

Where a lease covering oil and gas lands contains the provision that, in the event no well is completed during the first year of the lease, it may be extended by payment of an "annual rental thereafter until said first well is completed," but does not stipulate that the rent shall be paid in advance, the lessee has the privilege of paying at any time during the year, and upon his failure to pay suit will lie therefor.

*J. M. Swartz, for plaintiff.*

*Fitzgibbon & Montgomery, contra.*

WICKHAM, J. (orally).

The plaintiff in this case brought suit to recover rentals on oil and gas leases. There are two causes of action in the petition. There are two gas leases. The amount claimed in the petition is \$169 and interest. The leases were made on the 17th day

---

\* For contrary holding, see *North American Oil Co. v. Drumm*, 15 C.C. (N.S.), 230.

of March, 1908. The provisions of the leases are the same. They only differ in the amount of land and the amount of rental. Each contains a provision as follows:

“Provided a well is not completed on said premises within one year from the date hereof, unavoidable accidents or delays excepted, then this grant shall become null and void, unless party of the second part shall pay or cause to be paid to party of the first part at the rate of one dollar per acre annually thereafter until said first well is completed.”

The lessee paid the annual rental before the end of the year beginning March 17, 1909. No well was drilled the first year—between March 17th, 1908, and 1909. In 1910, the first annual rental was paid by the lessee. No rent was paid for the year ending March 17, 1911. The plaintiff brought suit to recover the rental.

It is claimed by the defendant that the lease became void by failure to pay the rental due in March, 1910. On the other hand, it is claimed by counsel for the plaintiff that the lease did not become null and void until after the year ending March 17, 1911. We are cited to *Archer's Law and Practice in Oil and Gas Cases*, page 700.

In *Rhodes v. Mound City Gas & Oil Co.*, 80 Kan., 762 (104 Pac., 851), the syllabus is as follows, second paragraph:

“In the absence of terms indicating a contrary intention, a covenant in a gas and oil lease to drill a well on the leased premises within two years, or thereafter pay \$80 annually until a well is drilled, does not require the annual payments to be made in advance, and the covenant is performed by a single payment of the entire sum at any time before the end of the year for which it is made.”

Our Supreme Court has held substantially the same in the case of *Gas Co. v. Eckert*, reported in the 70 Ohio State Reports, at page 127. The syllabus in that case reads:

“A grant to a corporation, its successors and assigns, without limitation as to time, of ‘all the oil,’ etc., upon the following terms: ‘First. Second party agrees to drill a well upon said premises within six months from this date, or thereafter pay to

1912.]

Drumm v. Oil Co.

the first party one hundred and sixty dollars annually until said well is drilled, or the property hereby granted is reconveyed to the first party. Seventh. Second party may at any time remove all their property and reconvey the premises hereby granted, which conveyance said first party agrees to accept, and thereupon this instrument shall be null and void,' after the expiration of six months, and until a well is drilled, is a lease at an annual rental of one hundred and sixty dollars, at the option of the lessee only.'"

From the statement of facts, it appears that the company did not drill a well within the time specified in the lease.

The company paid the sum or rental stipulated by the first section of the lease in each of the years 1895, 1896, 1897 and 1898, and on the 12th day of July, 1899, tendered the amount for the year thereafter ending in that month. So that it appears that they tendered the annual rental for the fifth year shortly before the expiration of the year, in July, 1899. The land owner refused to accept it and on the 11th of July, 1899, served notice upon the gas company that it had no further right under the lease, and that he had elected to and did terminate the lease.

On the 12th day of July, 1899, the gas company moved onto the property and undertook to erect a derrick for the purpose of drilling for oil.

The landowner then brought suit and obtained an injunction against the gas company from doing anything upon the premises. The court held that the plaintiff was not entitled to an injunction, and held that the lease was a valid and subsisting lease until the end of the year, and would continue if the lessee had paid the rentals; and as he did pay the rental, it was a subsisting and continuing contract. The circuit court held to the contrary, and the judgment of the circuit court was reversed and the cause was remanded for further proceeding.

As we understand the holding in the case—and the lease contained substantially the same provision as in the case before the court now—the Supreme Court held that the rental was due at the close of the year, and might be paid at any time before the end of the year; and there was no provision that the rental should be paid in advance.

In the 71st Ohio State, at page 302, the syllabus reads:

“A grant in consideration of one dollar of all the oil and gas under certain premises with the right to enter thereon for the purpose of drilling and operating for oil and gas excepting and reserving to the grantor the one-sixth part of all the oil produced and saved from said premises, to be delivered in the pipe lines with which the grantee may connect his wells, implies an engagement by the lessee to develop the premises for oil and gas.

“The time within which the implied engagement must be performed is postponed by acceptance of the sum specified in the condition of such grant that ‘in case no well is completed within ninety days from date hereof, unavoidable delay excepted, then this grant shall become null and void, unless second party shall pay to first parties, twenty-five cents an acre per year, payable by deposits at the ——— or directly to first party, after demand having first been made,’ and does not commence to run until the end of the year for which payment is accepted, and the lease does not become null and void at the end of such year upon refusal of the grantor to accept payment for another year.”

In view of these decisions by the Supreme Court, and it appearing that this was a lease stipulated for the payment of an annual rental, without stipulating that it should be paid in advance, we think that the lessee had a right to pay at any time within the year for which rentals were to be paid. The court holds that they had the whole of the second year in which to pay the rental for that year.

Whether the lease became null and void after the expiration of the last year, does not concern us now, because that question is not before the court.

We find that the plaintiff is entitled to recover the annual rental for the year ending March 17, 1911, in the sum of \$169, with interest; making a total of \$174.15. Judgment for plaintiff for \$174.15, with costs.



1913.]

Christ v. Eirich.

**LACHES IN PAYING TAXES ON ANOTHER MAN'S LAND.**

Common Pleas Court of Cuyahoga County.

JOHN CHRIST AND ARNOLD STEVERDING, EXECUTORS, v. WILLIAM F. EIRICH ET AL, COMMISSIONERS OF CUYAHOGA COUNTY, OHIO.

Decided, September 28, 1912.

*Taxation—Land Wrongfully Returned as Delinquent—Construction of the Provision for Return of Money to Purchaser at Tax Sale—Laches in Payment of Taxes Wrongfully Charged—Both Chance and Peril Involved in Purchases at Tax Sales—Errors Fundamental and Clerical in Tax Duplicate—Sections 2908, 2781 and 2782, R. S., and 2588 and 2590, G. C.*

1. The provision of Section 2908, R. S., as that statute read in the year 1885, that where land is erroneously returned as delinquent and is sold for taxes, the sale shall be void "and the money paid by the purchaser at such tax sale shall be returned to him," authorized the refunding only of the money paid for the certificate of purchase at the time of the delinquent sale, and did not authorize the refunding of taxes which became due and were paid by the purchaser subsequent to the delinquent sale.
2. Where an error in apportioning taxes is due to the neglect of a legal duty, it is deprived of the character of a mistake in the legal sense, and does not fall into the class which are characterized as clerical errors.
3. Inasmuch as the mistake which forms the basis of the present suit was due to the negligence of the auditor in placing in plaintiff's name on the tax duplicate land which did not belong to him, and upon which plaintiff paid taxes for a long period, it must be treated as a fundamental rather than a clerical error, and an order for the issuance of a refunder for taxes so wrongfully charged, and which the plaintiff paid, can not be granted.

*H. G. Schaibly*, for plaintiffs.

*Wm. E. Minshall*, contra.

FORAN, J.

On appeal from the decision by county commissioners.

In 1874 one Louis Harms was the owner of two lots located on the northerly side of St. Clair street in the city of Cleveland,

Ohio. These lots were each fifty feet wide and two hundred feet deep, running northerly from the north line of St. Clair street. At that time said St. Clair street was sixty feet wide. In 1874 the city, by ordinance, provided that the width of said St. Clair street should be increased to ninety-nine feet, and to that end appropriated approximately thirty-four feet off the lots abutting on the northerly side of the street, leaving the Harms lots but one hundred and sixty-six feet deep. Subsequently during the same year 1874, Harms sold from the extreme northerly end of these lots thirty feet of land, leaving the land still owned by him one hundred and thirty-six feet deep from the new line of St. Clair street, or one hundred and seventy feet deep, measured from the old or original line of said St. Clair street. In 1875 Harms sold these lots, then only one hundred and thirty-six feet deep. The deeds were duly presented to the recorder of the county for transfer. The deeds or descriptions of the lands as recited in the deeds, are not before the court, but it is quite probable the lands were sold by lot number, or, if described by metes and bounds, St. Clair street was indicated as the southerly boundary of the lots.

The recorder, in transferring these conveyances, took the old or original line of St. Clair street as the southerly boundary of the lots instead of the new line as widened by the city in 1874. This left a parcel of land one hundred feet wide and thirty-four feet deep at the northerly end of the lots apparently still in the name of Harms. As a matter of fact this parcel of land was owned by the parties to whom Harms had made these conveyances in 1875.

The taxes on this parcel of land, the land being still apparently listed for taxation in the name of Harms, became delinquent, and the same was sold at delinquent tax sale in January, 1883, to one Kelly, who paid the taxes then appearing due thereon as of record in the auditor's office, and received from the auditor the usual certificate of purchase, which certificate Kelly assigned, about a month later, to one Hill. In December, 1883, the auditor discovered that an error had been made, and refunded to Hill the money paid for the certificate of purchase at said tax sale.

1913.]

Christ v. Elrich.

The auditor then, as appears by the agreed statement of facts upon which this case is submitted, made an entry "on the tax sale records of his office, on the same lines where said tax sales are recorded," in the following words: "Double entry; money refunded Dec. 5th, 1883." The auditor, however, did not take this parcel of land from the tax duplicate, but the same was still carried in and remained listed in the name of the said Hill.

In January, 1885, the taxes on this parcel of land again appeared delinquent, and it was again sold at delinquent tax sale to Valentine Christ, who paid the taxes appearing due thereon and received from the auditor the usual certificate of purchase. Christ continued to pay taxes assessed against the land until June, 1889, when he surrendered his certificate of purchase and received from the auditor a tax deed or deeds to the land, and paid the taxes thereon until and including the year 1908, the amount so paid being \$257.93.

Valentine Christ died May 17th, 1910, and the plaintiffs in this proceeding are his duly appointed and qualified executors. On March 11, 1911, they presented to the defendants, as county commissioners, a claim for said \$257.93, so paid by the said Valentine Christ, and asked that the same be allowed. This claim the defendants allowed for the amount originally paid and the taxes for the years 1904, 1905, 1906, 1907 and 1908, being for five years including the year 1908, the last year Christ paid taxes on the land, the amount so allowed being \$62.25. The balance, \$195.68, was disallowed.

From this allowance or decision of the county commissioners an appeal is filed in this court, by virtue of Section 2461, General Code, which provides that if a person is aggrieved by the decision of the county commissioners in any case, such person may, within fifteen days thereafter, appeal to the next court of common pleas.

Counsel for the defendants claim that under the facts in this case the appeal does not lie, for the reason that "the right of appeal is limited to matters in which the commissioners are vested with judicial function." It is true that where the duty is purely ministerial and in no way involves judicial discretion, the

remedy, if there be one, is by mandamus, and the court of common pleas would have no jurisdiction by appeal in such case (*Commissioners v. Hune*, 33 O. S., 176). A judicial act is an act done by a member of the judicial department of government, in construing the law, or applying it to a particular state of facts presented for a determination of the rights of the parties thereunder (*Smith v. Strather*, 68 Cal., —; 8 Pac. Rep., 852). In a ministerial act there is no dependence on the exercise of judgment as to the propriety of doing the act, while a judicial act involves the exercise of judgment and discretion. We think there can be no doubt but that the commissioners were called upon, in determining whether this claim should be allowed or disallowed, to exercise both judgment and discretion; and for the consequences of their decision, whether well or ill judged, they are not collectively or personally liable; and therefore their action was not purely ministerial, and was *quasi* judicial.

Counsel for appellants claims the right to recover the amount originally paid for the certificate of purchase, received by Christ at the time, January, 1885, of the tax sale and all taxes thereafter paid by him, under and by virtue of Section 2908, Revised Statutes. This section, as it read during all of these transactions, provided that if the taxes charged on any land are regularly paid and the land is erroneously returned delinquent and sold for taxes, the sale shall be void, "and the money paid by the purchaser *at such tax sale* shall be refunded to him." Evidently this section of the statute, before the act of revision of February 14, 1910, provided only for refunding money paid for the certificate of purchase, that is, the money paid at the time of the delinquent tax sale. No other construction can be placed upon this statute as it read during the time these transactions took place. The amount so paid, \$6.12, was allowed by the commissioners, as appears by the appeal or petition of plaintiffs. This allowance will not be disturbed, although, in view of the lapse of time (some twenty-three years), intervening between payment and demand for refunder, it is questionable whether it should be allowed; but as no complaint is made by counsel for defendants in that respect, it will stand.

1913.]

Christ v. Elrich.

Secondly, counsel for the plaintiffs insist that the whole amount of the tax paid by Christ, including the amount paid for the certificate of purchase, should be refunded and that authority for so doing is conferred upon the county commissioners by Sections 2588, 2589 and 2590, General Code.

Section 2588, General Code, provides that the auditor, from time to time, shall correct all errors which he discovers in the tax list and duplicate, first in the name of the persons charged with the tax or assessment; second, in the description of the land or property; third, when property exempt from taxation has been charged with taxes; fourth, in the amount of taxes or assessment charged. This section as amended January 16th, 1873 (70 O. L., 10 and 11), provided that the auditor should correct all errors which he discovers "in the tax list and duplicate, either in the name of the person charged with the tax or assessment, the description of the land or other property, or in the amount of such taxes or assessments." It will be noticed that the words "or when property exempt from taxation has been charged with taxes," did not appear in the statute at that time. This statute, as it then stood, was construed by our Supreme Court in *State of Ohio, ex rel, v. Commissioners*, 31 O. S., 271. In that case it appears that for five years prior to the beginning of the action taxes were annually levied and collected on certain real property, situated in Montgomery county, which, as a pure public charity, was not subject to taxation under the law of this state. Application was afterwards made to the county auditor to draw his warrant upon the county treasurer in favor of the relator for the amount of taxes so paid. The auditor refused to comply with the request, and a writ of mandamus was prayed for, commanding the auditor to issue a warrant to the treasurer for the amount so paid. The Supreme Court held that "the errors named in the statute are clerical merely, but the error complained of by the relator is fundamental. The question, whether specific property is or is not subject to taxation, was not, by this section of the statute, submitted to the judgment of either the auditor of the county or the board of county commissioners," and the writ was therefore refused.

This holding by our Supreme Court resulted in an amendment to the statute by the Legislature, by which amendment the words "or when property, exempt from taxation, has been charged with taxes" were included. In this case the auditor placed upon the tax duplicate or listed for taxation property which, under the law, was exempt from taxation; and, as will be seen, it was held that this was not one of the errors named in the statute, but that it was a fundamental error. In other words, a mistake occurring in an original or primary act is not clerical but fundamental (22 W. L. B., 294). That is, the statute was intended to empower the auditor to correct mere clerical errors, but did not give him power to correct a mistake made as an original or primary act.

In *Sandhegger v. Commissioners*, 9 W. L. B., 20, it was held that where a new building was erected on land to replace an old building which was torn down, and the value of the new building was added to the valuation, no deduction being made for the old building, that the county commissioners were not authorized under this statute to refund the tax which had been paid for several years on the excessive valuation. To state the case more clearly, the valuation of the land or premises before the erection of the new building included, of course, the valuation of the old building, and when the new building was erected the value of this new building was simply added to the valuation as it stood before the new building was erected; and, as will be seen, this was held to be a mistake occurring in an original and primary act, and was therefore fundamental and not clerical, and was not an error for which the county commissioners might make an allowance for the excessive taxation.

In *Ohio, etc., v. Brewster*, 11 W. L. B., 38-41, it was held that where facts did not appear upon the face of the return, but must be determined by the auditor by investigation, this section of the statute did not apply.

There are many other decisions to the same effect, and it seems that the principle to be deduced from these decisions is, that if the direct object of the inquiry before the commissioners is to determine the *existence*, kind and value of certain property, any

1913.]

Christ v. Eirich.

error therein would be fundamental (*Mitchell v. County Commissioners*, 22 W. L. B., 293). It seems to be well settled by the adjudicated cases that the errors which the auditor may correct by virtue of Section 2588 are errors of bookkeeping or of copying, and that the statute does not afford a remedy or permit a refunder in cases where the errors are fundamental in character.

In *The Barney & Smith Mfg. Co. v. County Commissioners*, 29 W. L. B., 266, it was held that "the errors which it is contemplated by this section the auditor may discover and correct, are such as may be detected by an inspection of the books and papers in his possession or under his control, and are merely clerical errors."

The statute does not apply to errors of law, but to bookkeeping. *Brooks v. Lander*, 13 O. D. (N. P.), 634-639.

In the case of *Ives v. Commissioners*, 10 Am. L. R., 306, it was held that where the city appropriated land and the taxes were afterward charged against the land so appropriated, in the name of the owner of the land before appropriation, that the error was fundamental and not clerical. We think this is a case practically in point. So also it has been held that erroneous valuation is fundamental and not clerical. 21 W. L. B., 317.

Sections 2781 and 2782, Revised Statutes, provide that the county auditor has power to correct false returns made by persons in listing property for taxation, and to add a penalty therefor. If in correcting such false returns he makes an error of judgment in his additions, and taxes are paid thereon, no refunder can be had under or by virtue of Section 2588, General Code (11 W. L. B., 39), and for the reason that such mistake of judgment is not a clerical error—a mistake in writing or the erroneous writing of one thing for another. Such error of judgment would be a mistake or an error in action. The errors contemplated by this section (2588, G. C.) relate to inaccuracies due to oversight or accident, or to discrepancies between what is thought to be true and what really is true, that is, something different from what was intended. A mistake differs from a clerical error in this, that a mistake is an erroneous act or omission arising from ignorance or confusion; or, as Pomeroy de-



finer it, a mistake in law is an erroneous conception that influences the will and leads to action. We think it elementary that if a mistake is due or owing to the neglect of a legal duty, such neglect of a legal duty deprives the error of the character of a mistake, in the legal sense. Therefore, keeping or placing the land sold to Christ on the tax duplicate was not a clerical error, and no refunder should be allowed for taxes or assessments paid after the certificate of purchase was given to Christ.

This holding may seem to work a hardship, but it must be remembered that persons purchasing lands at delinquent tax sales do so, in large measure, at their peril. Such purchases have in them many elements of chance, which are taken by such purchasers because of the large penalties assessed against the owner, for the benefit of the purchaser, when the owner seeks to redeem the lands. Besides, it may be said that the purchaser of lands at a delinquent tax sale has the same means of ascertaining everything relating to lands, the title thereto, the listing thereof, and the taxes and assessments levied thereon, that the auditor and treasurer has, and he ought not to be heard to complain if he purchases blindly and without investigation. As a general rule, when a man pays taxes, the law regards the payment as voluntary, and no recovery can be had of the taxes so paid, unless by express statutory provision. Any other rule would cause chaotic confusion in determining the amount of revenue required and in the collection and distribution of taxes and assessments from year to year.

From the agreed statement of facts upon which this case was submitted, it does not appear that when the appropriation of the land owned by Mr. Harms, for the purpose of widening St. Clair street, was made by the city, the auditor had any knowledge of that fact. The statutes in this state nowhere provide, so far as we are able to ascertain, that it shall be the duty of a municipality to notify the auditor of the county when it appropriates land for street purposes, or to furnish him with a description of the land appropriated.

From inquiry made by the court at the auditor's office, it seems that the practice in this county is for the city clerk to send



1913.]

Christ v. Eirich.

to the auditor a copy of all ordinances providing for the appropriation of land for municipal purposes; but these copies of ordinances so furnished the auditor are not even certified by the municipality as being correct. If this be true, it is difficult to understand how the county auditor, in listing lands for taxation, can determine from the books and records in his office whether any of the lands in the county have been appropriated for municipal purposes; and it is therefore quite evident that the original error in this case, occurring in 1874, was a fundamental error and not a clerical error.

Evidently the attention of the auditor, however, was called to the mistake in December, 1883, by Hill, who then owned or held the certificate of purchase given Kelly, and the money paid therefor was refunded to Hill. It appears that the auditor at the time, upon the discovery of this mistake, made an entry on the tax records of his office on the same lines where said tax sales are recorded, to the effect that it was a double entry, and the money was refunded December, 1883. The auditor at this time had knowledge of the mistake, and it was his plain duty to take this parcel of land from the tax duplicate; this he failed to do. Can it be said that this negligent omission to perform a plain duty was such an error as is contemplated by Section 2588, General Code? We think not. Instead of an error, it was gross and negligent failure of duty, for which the auditor, as a ministerial official, might be held liable. The errors mentioned in this section of the statutes are errors in the description of lands, errors in the amount of taxes or assessment assessed, or errors in the names of the party charged with taxes. The negligent omission or failure of the auditor to take this parcel of land from the tax duplicate evidently does not fall within this provision of the statute. The other provision of the statute relating to property exempt from taxation is especially provided for and was inserted in the statute, as we have seen, because of the decision in the 31 O. S., 273, already referred to.

We therefore hold that the county commissioners had no authority, under Section 2588, to make any allowance to the executors of Christ for any taxes paid by Christ, after he obtained

a tax title to this property or after he received his certificate of purchase; but inasmuch as the county commissioners made an allowance for the five years preceding and including the last year for which taxes were paid, and counsel for the county do not ask that this allowance be revoked, it will not be disturbed.

Section 2590, General Code, provides that "no taxes or assessment shall be so refunded except such as have been erroneously charged in the five years next prior to the discovery thereof by the auditor."

Where a city had appropriated land by condemnation proceedings, and the owner continued to pay taxes on the same, he not having notified the auditor to take such lands off the tax duplicate, such payment of taxes is not an error on the part of the auditor, but is due to his own failure in not having the correction made, and no refunder of taxes will be allowed. *Ives v. Commissioners, supra.*

It appears from the records in this case that Christ paid taxes upon land, which the county treasurer had no right to sell, for twenty-three years; and further, that he received a tax title deed. The law provides that the holder of a certificate of purchase may surrender the same two years after receiving it, and receive from the auditor a tax title deed. Before this deed is furnished, however, it is the duty of the county surveyor to furnish the auditor or the purchaser with a description of the land named in the certificate of purchase. If the surveyor had performed his duty in the premises, and actually surveyed the land in question, the mistake would have been discovered. If he failed to do this, and made a description for Christ from the description in the certificate of purchase itself, this would have been such negligence on his part as might have made him liable personally to Christ. In any event, it is difficult to conceive how Christ could have continued to pay taxes on another man's land for twenty-three years without being guilty of gross laches, which would, we believe, estop him from making any claim during his lifetime; and if he could not legally assert claim for a refunder during his lifetime, surely his executors will not be heard to do so.

1913.]

McWilliams v. Cincinnati.

If the plaintiffs were entitled to recover at all, they could only recover for such taxes or assessments as have been erroneously charged and collected for the five years preceding the discovery of the error (*Barney, etc., Mfg. Co. v. Commissioners*, 29 W. L. B.; *Hagerty v. State*, 14 O. C. C., 95). But, as we have seen, the plaintiffs can only recover if the error is clerical merely; and are not entitled to recover if the error was fundamental, as already indicated. We believe from the facts in this case that if there was error, it was fundamental; but, as a matter of fact, we hold that the failure of the auditor to take this land from the tax duplicate in December, 1883, was a negligent mistake, occurring in the original and primary act of the auditor, and can in no sense be said to be clerical.

For the reasons indicated, the allowance or decision of the county commissioners will be affirmed and the appeal dismissed.

---

#### DAMAGE TO PROPERTY FROM COLLAPSE OF SEWER.

Superior Court of Cincinnati.

McWILLIAMS & SCHULTE v. CITY OF CINCINNATI.

Decided, October, 1912.

*High Water Causes Sewer to Burst—Adjacent Property Damaged—Liability of Municipality Growing Out of the Building of an Embankment.*

An action by a property owner, for damages resulting from the bursting of a sewer during high water, does not lie against a municipality on the allegation that the collapse of the sewer was due to the building of an embankment upon which a street is carried over low ground, unless it is made to appear that the embankment turned the rising water into the basin in which the sewer was located and from which basin the embankment prevented the water from escaping.

*Byron M. Clendenning*, for plaintiff.

*John W. Weinig*, contra.

HOFFHEIMER, J.

This was an action for damages to plaintiff's property alleged to have been caused by the negligence of the city in damming up waters of Millcreek, thereby causing by pressure the crushing or breaking of the large trunk sewer adjacent to plaintiff's property.

The cause was heard by the court and a jury, and at the conclusion of plaintiff's evidence, the defendant moved for an instructed verdict. This motion the court allowed.

At that hearing many authorities were cited by this plaintiff in support of its alleged cause of action, and from such examination as the court was then able to make of the cases, and upon the points involved, it concluded that under the facts as shown, no imperative duty devolved upon the city, either as to this alleged embankment or the penned up waters (even assuming they may have caused the break in the sewer), and with reference to the carrying out of which duty there was culpable neglect.

Since the trial was had, I have had an opportunity on this motion for a new trial to review the many cases cited at the trial, as well as those submitted in plaintiff's brief, only to arrive at the same conclusion.

There could not have been any duty on the city towards plaintiff with reference to the waters of Millcreek, which overflowed their banks and which found their way to the place designated herein as basin Number 1, unless Gest street was an artificial embankment, built by the city, and unless it was shown that prior to the building thereof (if same was actually built by the city), the waters that would find their way to said place when Millcreek overflowed its banks, eventually flowed off again to the north and in an unobstructed flow.

If the city built a barrier or embankment where Gest street is located, the effect of which was to pen up or obstruct such waters, I can readily understand that an imperative duty would then rest on it to maintain and care for a culvert in said artificial barrier or embankment, and any culpable neglect in such regard would render it liable for damages proximately resulting therefrom.

1913.]

McWilliams v. Cincinnati.

At the trial of this case plaintiff, however, failed to show that prior to the erection of the alleged artificial embankment, on the surface of which is Gest street, the waters of Millcreek that may have found their way to the territory designated as basin one, all receded north, as Millcreek receded, and plaintiff further failed to show that Gest street was an artificial embankment erected by the city. Consequently, even if we concede that the city would have no right to dam up the rivers of Millcreek in the basin complained of, and without providing and caring for necessary outlets, no duty rested on the city in this case, because the evidence wholly fails to show that the city dammed up said waters.

As stated, there is nothing in the evidence to show that Gest street is an artificial embankment, or that the city in erecting same, if it did erect same, dammed up said waters.

On motion for new trial, it is urged that plaintiff relied on said matters being such as the court would necessarily take judicial notice of.

It is claimed that a city ordinance, No. 756, with reference to establishing the grade of Gest street exists, and that it was the duty of this court, although no such ordinance was either pleaded or proven as a fact, to take judicial notice of such ordinance.

Proof that a dam or barrier was built by the city, the effect of which was to dam up or pen up overflowing waters of this natural course, can not in my opinion be thus supplied by the court. *City v. Lothsheutz*, 10 N.P.(N.S.), 247-259. The determination of this point, it seems to me, is decisive.

Plaintiff states that he made diligent search previous to the trial for evidence tending to prove that the city built said embankment and could find none, and that he assumed at the trial that the court would take judicial notice of such fact, namely, of the embankment built by the city. He states that since the trial, he has discovered evidence in such regard, and urges newly discovered evidence as ground for a new trial.

Were we to say, however, in view of plaintiff's frank admission that he assumed the court would take judicial notice of the matter referred to, that plaintiff exercised the proper diligence,

such evidence, even if offered, would not necessarily require a different conclusion, because as already stated, there was failure to show that prior to the building of the alleged embankment, if the city did build it so as to dam or pen up these waters (when Millcreek overflowed) all the back water from Millcreek which found its way to what we call basin Number One was unimpeded in its flow to the north as Millcreek receded.

For the reasons stated, it is the duty of the court to overrule the motion for a new trial, and it is so ordered.

---

#### DEPARTURE FROM CAUSE OF ACTION ON APPEAL.

Common Pleas Court of Licking County.

WM. H. MEAD, JR., v. JAMES B. CUSH.

Decided, January Term, 1912.

*Appeal—Open to Dismissal where Cause of Action Has Been Changed  
—Character of Action for Recovery of Insurance Premiums Overdue.*

1. An action to recover insurance premiums alleged to be due and unpaid is not an action on an account, but is for money paid out at the request of the defendant.
2. On appeal to the common pleas, a motion will lie to strike from the files an amended petition which states a cause of action different from that tried before the justice of the peace.

*J. V. Hilliard*, for plaintiff.

*Flory & Flory*, contra.

SEWARD, J. (orally).

This case is submitted to the court upon a motion to strike the amended petition from the files, because it is a departure from the action which was brought before the justice of the peace. The case comes into this court upon appeal. The action below was upon an account. A copy of the account was attached to the original petition filed in this court. It is a pure and simple action upon an account. In another case of the same party

1913.]

Mead v. Cush.

against another defendant, this court held that he could not maintain the action on an account; that it must be for money paid out for and at the request of the defendant. That case went to the circuit court, and the judgment of this court was affirmed. The pleader attempts to amend this petition by conforming to the judgment of this court and the circuit court, and alleges in the amended petition that this money was paid out at the request of and for the use of the defendant.

The question is whether that is a departure from the original action. I think it is. I am only able to find one case which seems to be on all fours with this case. It is the case of *Strauss v. Adams et al*, reported in 4 Nisi Prius, at page 109:

“The court of common pleas of this state is a court of general original and appellate jurisdiction. When a case is appealed to the court of common pleas, from a judgment of a justice of the peace, its jurisdiction over it is appellate only, and limited to the cause tried in the justice’s court.”

I will read from the opinion of the court:

“This action comes into this court upon appeal from the decision of a justice of the peace.

“It has been submitted upon a motion to strike from the files the third amended petition, and to dismiss the appeal, upon the ground that there is a departure from the cause of action tried before the magistrate, and the one set up in said amended petition.

“The claim tried before the justice of the peace, and appealed to this court, is an open account, stated in the bill of particulars as follows:

“‘The plaintiff says there is due him from the defendants the sum of \$61.65 for goods, wares and merchandise, sold and delivered to said defendants by the above plaintiff, during the past year—for which amount with interest thereon from the 21st day of May, 1894, at the rate of six per cent., the plaintiff asks judgment.’”

The account in the case at bar was for insurance premiums alleged to be due.

“No leave to amend says the court in *Strauss v. Adams*, has been asked, or granted, in this, or the justice’s court. The

cause of action set up in said petition is therein stated in two counts, each based upon the same claim—the first upon an account stated and a promise to pay it—the second is for an alleged balance found due the plaintiff upon an alleged settlement of said account. The amount claimed in each count, is less than one hundred dollars.

“In the motion under consideration, the defendants ask, first, that the third amended petition be stricken from the files; and second, that the appeal be dismissed, upon the ground that the cause of action set up in the petition is a departure from the cause of action tried before the magistrate.

“The claim in each count in the third amended petition is a different cause of action from the one tried before the magistrate. It is therefore an attempt to abandon the cause of action tried before the justice, and appealed to this court, and to substitute for it, and try in this court, another and different cause of action. That change is a departure in pleading, and thereby a cause of action is set up of which this court has no jurisdiction.”

The court thinks that the same is true in this case. The motion to strike the amended petition from the files may be sustained.

I might say that if the pleader made a mistake below, his only remedy is to dismiss and bring his action properly.



1913.]

Fulton v. Spear &amp; Co.

**DAMAGES FOR INEXCUSABLE SEIZURE OF HOUSEHOLD  
GOODS.**

Common Pleas Court of Hamilton County.

**JENNIE FULTON V. SPEAR & COMPANY.**

Decided, June 14, 1912.

*Unjustifiable Seizure by an Installment House—Measure of Damages  
Therefor—Prejudice of Jury—Charge of Court—Grounds for Re-  
mittitur.*

1. The entering of plaintiff's apartments by agents of an installment house, and the seizing and carrying away of part of her household furniture, through mistake but without justification, was an act which was calculated to prejudice a jury impaneled to fix the damages suffered by plaintiff thereby; and where the verdict so returned was for \$3,500, it must be regarded as excessive, and it is the duty of the trial court to reduce by remittitur the amount thus fixed.
2. In the case at bar the plaintiff was in delicate health, and the damages suffered by her from humiliation and nervous shock may reasonably be fixed at \$1,000, while there may properly be added thereto \$500 as punitive damages and \$500 as counsel fees, making \$2,000 the total allowance.

*Bolsinger, Pink & Hawke*, for plaintiff.

*Johnson & Levy*, contra.

GORMAN, J.

On motion for a new trial.

This is an action by Jennie Fulton against Spear & Company to recover damages for the wrongful taking of part of her furniture without process of law, and without any justification therefor. The evidence disclosed that the plaintiff lived in two rooms, at 718 West Fifth street, during the year 1910; that prior to November 23, 1910, defendant sent several postal cards to her threatening to take her furniture if she did not appear and pay certain delinquencies which they claimed to be owing from her. On the 22d of November, 1910, two employes of the defendant

company attempted to force an entrance into plaintiff's rooms in her absence, and attracted the attention of neighbors living in the same building with plaintiff. On the 23d of November, 1910, two employes of the defendant company appeared with a wagon, at about 7:30 A. M., before the plaintiff was fully dressed, came to her rooms and demanded a dresser and bed which they claimed she had bought from the defendant and for which she had failed to fully pay. Plaintiff in order to satisfy these men that the furniture was not bought of Spear & Company, asked them if they could identify the furniture, and they said they could. The men examined the furniture and found that it had not been bought of Spear & Company; one piece had been bought at Indianapolis several years ago, and another piece at Conroy's, and the stencil marks of the dealers were on these pieces of furniture. The employes then left saying that they would call up Spear & Company and tell them that the furniture did not belong to them. Shortly thereafter they returned to plaintiff's rooms, took the mattress off the bed and took away the bed and the dresser after taking out all her clothing from the dresser.

The evidence showed that plaintiff never dealt with Spear & Company; the furniture did not belong to them; that she was ill at the time and claimed that as a result of taking the furniture she was unable to attend to her vocation for a period of eleven weeks; that she suffered from tuberculosis and that the nervous shock, the humiliation and indignity upon her had aggravated her illness.

The defendant admitted the taking of the furniture, and that it had no right to take the same, but claimed that it had made a mistake.

In the opinion of the court the defendant was guilty of a gross violation of the plaintiff's civil rights. There was no excuse or justification for defendant's conduct. It had no right to take the furniture that had not been bought from it. Its agents had called at this house to inquire for one Mrs. Stevens, whom they claimed had purchased furniture from Spear & Company, but plaintiff had informed these agents that her name was Fulton; that she had not dealt with Spear & Company, and was not acquainted with Mrs. Stevens. There was evidence tending

1913.]

Fulton v. Spear &amp; Co.

further to show that the agents of the defendant had inquired of the neighbors, in the building where plaintiff lived, about Mrs. Stevens, and had been told that she was not then living there. The defendant company's agents simply took the law into their own hands, and with a reckless disregard of the plaintiff's rights, invaded her rooms and took away her furniture without having any semblance of claim to it and without any legal or moral right on its side.

The court charged the jury in substance that plaintiff was entitled to recover compensatory damages, and that if the jury found that there was malice or insult involved in the conduct of the defendant company, they might go beyond compensatory damages and assess punitive damages, the amount of which would be left to their sound judgment and discretion. The court further charged the jury that, if they found that the element of malice, fraud or insult had entered into the defendant's conduct, they might award plaintiff not only compensatory damages and punitive damages, but also reasonable counsel fees for the prosecution of the case; the amount thereof was left to the sound judgment and discretion of the jury. The jury returned a verdict for plaintiff for \$3,500, and a motion is now made to set aside this verdict and grant a new trial.

All the statutory grounds for a new trial are set out in the motion.

Practically the only claim made by the defendant, in the argument of its counsel on the motion for a new trial, is that the verdict is excessive, appearing to have been given under the influence of passion or prejudice. Counsel for the defendant admit that the court correctly charged the law as to the right of the plaintiff to recover, and as to the damages and the measure thereof. The defendant in the trial of the case and the admissions before the jury, and in counsel's argument, admitted that the only question involved in the case was the amount of the damages, admitting the plaintiff's right to recover. It was urged that while the charge of the court was sound law, nevertheless, the charge was not evenly balanced and that certain language employed by the court in his charge to the jury had a tendency

to prejudice the jury against the defendant, or to arouse their passions against the defendant.

The language complained of was as follows:

“And under the Constitution it matters not what his condition may be, or has been, regardless of race, color or previous condition of servitude, every person stands on an equality before the law, and is entitled to the same fair treatment, whether he be a millionaire or a pauper. The plaintiff’s place of abode, although it be ever so humble or small, is her home. The rooms in the building where she lived were just as much her home as though she owned and resided in a magnificent mansion, located in our most fashionable and exclusive suburb; and she was entitled, under the law, to the same privacy and security and protection in her house, person and property, as though she had been the greatest person in the land, as though she were the President of the United States. Her rooms were her castle, and within their limits none might intrude or forcibly enter without her consent or warrant or authority of law. This place of her abode was a sacred place for her and her family, and for any invasion thereof by defendant, its agents or employes, without having either a legal warrant to enter, or an entry for business purposes, or upon her invitation as her guest, or by her consent, the defendant would be guilty of a violation of her legal rights, and liable to her in damages for all the natural and proximate consequences which resulted from the wrongful invasion of her house. \* \* \*

“It was the duty of the defendant company through its officers and agents not to enter into the house or the rooms of the plaintiff without her consent, or unless they had a warrant or authority of law to do so. If it held a search warrant, they might enter with an officer; or if they were there upon lawful business, they might go there and make a demand for money that was owing, or in furtherance of any other business transaction, but even then they would have no right to enter without the consent or the invitation of the plaintiff, express or implied.

“Now, in this case, gentlemen of the jury, if you find in favor of the plaintiff—and you must find in favor of the plaintiff for some amount—because as I stated, the defendant admits that it wrongfully entered her house, you will then consider the question of her damages—what damages she is entitled to recover. She is entitled to recover the natural and proximate damages, or the damages which were the result of the natural and probable consequences of the defendant’s wrongful acts.”

1913.]

Fulton v. Spear &amp; Co.

The court is of the opinion that no error was made in employing the language above quoted. It is the law of the land, and if it is not it should be, that all persons high or low, rich or poor, great or small, regardless of their positions or condition, stand equal before the law, and are entitled to the equal protection of the law. Whether the plaintiff's feelings were as much outraged as would be those of a woman brought up in luxury and refinement, was a question for the jury to determine under all the evidence and circumstances of the case. The court is not disposed to disturb the verdict on the ground that any error was committed in the use of the language employed in the charge to the jury. It is possible that the language employed may have had a tendency to arouse the feelings of the jurors against the defendant because of its unjustifiable conduct.

The amount of the verdict seems to the court to be very large in view of the injuries shown to have been suffered by the plaintiff. Taking the amount of the verdict, the evidence in the case and all the circumstances, the fact that the defendant was selling furniture on the installment plan, and that a prejudice might well have existed in the minds of the jurors against the defendant because of the character of its business and the conduct of its managers, I am of the opinion that substantial justice would have been awarded to the plaintiff if a verdict of \$2,000 had been rendered in this case. It appears to the court that there has been an excessive verdict in the case and that this excessive verdict under all the evidence and circumstances must be attributed either to passion or prejudice. It is the duty of the court to protect litigants against unjust verdicts and to see to it that substantial justice has been done in the trial of the case. In this case I am of the opinion that \$1,000 would have been a fair compensation for the plaintiff on account of her compensatory damages; that \$500 would have been a good round sum to allow as punitive damages, and \$500 a good round sum for her counsel fees, making a total of \$2,000. I think that a judgment of \$2,000 would not only deter the defendant in this case from committing a like offense hereafter, but would have a wholesome and salutary effect and influence upon other persons, partnerships

and corporations who might be disposed to follow the example of the defendant in this case. If the plaintiff will accept a remittitur of \$1,500 in this case, the motion for a new trial will be overruled and a judgment entered in the sum of \$2,000.

### AGREEMENT TO MAINTAIN A STAIRWAY.

Common Pleas Court of Summit County.

JOHN F. KRATZ ET AL V. O. P. F. RISCH ET AL.

Decided, November 25, 1912.

*Deeds—Privity of Estate—Covenant Runs with the Land, When—Evidence as to Intention of the Parties—Land Subjected to a Servitude by Agreement to Maintain a Structure.*

1. The recital in a deed, "subject to the condition that the owner of the part of the said lot herein described shall build, construct, maintain and keep in repair a passage, stairway and landing not less than three feet in width along and adjoining the party wall between the south part of said lot and the part herein described," constitutes a covenant running with the land, and not a condition subsequent or an agreement personal to the parties thereto.
2. In construing such a recital it is not error to admit testimony throwing light upon the circumstances surrounding the parties to the deed at the time of its execution.

*Geo. M. Anderson*, for plaintiffs.

*Allen, Waters, Young & Andress*, contra.

STROUP, J.

The only question for determination as made in the briefs of counsel, and the only one I am called upon to decide, pertains to the proper construction to be placed upon a certain clause in a warranty deed executed by Edward B. Angel to Thomas Uppington, under date of May 19, 1866, which deed conveys certain premises located on Howard street, in the city of Akron, Ohio.

1913.]

Kratz v. Risch.

Does the following language employed in the deed create a covenant running with the land, or a condition?

“Subject to the condition that the owner of the part of said lot herein described shall build, construct, maintain and keep in repair a passage, stairway and landing not less than three feet in width along and adjoining the party wall between the south part of said lot and the part herein described from the east line of Howard street to the second-story of such building as may be upon the part of said lot herein described and that said passage and stairway shall at all times be and continue an open, free and unobstructed passage for all persons and for all purposes for which such ways are ordinarily used.”

The plaintiffs contend that a condition subsequent was created by the above language, that the language used does not evince an intention of a covenant running with the land, and that in law the subject-matter is not of such a character that it can be deemed to be a covenant running with the land, and since the parties hereto were not the original parties to the deed, nor heirs of the same, that for that reason the plaintiffs are not in law bound to construct, maintain or keep in repair the stairway mentioned in the above quoted clause, that the defendants have no right to use the same as an approach to the upper stories of their building, and that an injunction should be granted enjoining the use of the stairway on the part of the defendants.

The defendants contend that a covenant running with the land was created by the language employed and that the plaintiffs are therefore under obligation to maintain the stairway in question, and that the defendants have the right to use the same as a means of access to their building, and they pray for a dismissal of the petition.

So it will be seen that if a covenant running with the land was created, the plaintiff's case must fail, but if a condition subsequent was created the prayer of the petition must be granted.

At the hearing of the case there was introduced evidence showing the location of the premises at the time the deed was made, as bearing upon the proper construction to be placed on the language used, and the court allowed such testimony to be

given, taking the question as to the admissibility of the evidence under advisement, to be passed upon when the case was finally disposed of. It being plain to the mind of the court from a reading of the deed that it is necessary to look to the circumstances surrounding the parties and the premises to properly construe the language employed, I hold that such testimony was competent and overrule the objection made thereto, and a proper exception is noted.

In support of this ruling I cite but one of the many authorities on this subject, namely, 11 Cyc., page 1058:

“In determining the subject-matter of a covenant, it is the duty of the court to ascertain the intention of the parties, and if that be lawful to give effect to it, and when the language employed is so ambiguous and contradictory as to leave it doubtful what the parties did intend, it must call to its aid the surrounding circumstances, the object had in view by the parties, and their state and condition.”

Aided by the evidence showing the surrounding circumstances, what is the proper construction to be placed upon the deed as to the intent or otherwise of creating a covenant running with the land conveyed? The evidence shows that the original grantor, Edward B. Angel, owned two parcels of land on Howard street. The south parcel at the time the deed was made was nearly, if not completely, occupied by a block, and as the building was constructed the only means of getting to the second floor was by the use of an outside stairway, which was located on the north parcel. Angel in the deed mentioned conveyed the north parcel, which at that time had no building standing upon it, and therefore it became necessary to place in the deed the clause in question.

What did the parties intend by this clause? Was it to be merely a personal covenant or was it to be a permanent agreement?

The clause in question states “the owner of the part of said lot herein described (the north parcel) shall build, construct and maintain and keep in repair a passage, stairway and landing.”



1913.]

Kratz v. Risch.

It will be noted that the obligation, by the language used, is confined to the owner, and does not in words include his assigns. The clause does state that a "passage, stairway and landing not less than three feet in width along and adjoining the party wall between the south part of said lot and the part herein described from the east line of Howard street to the second-story of such building *as may be upon the part of said lot herein described*, and that such passage and stairway shall at all times be and continue an open, free and unobstructed passage for all persons and for all purposes for which such ways are ordinarily used." Evidently the original grantee, from the reading of this clause, was contemplating the erection of a building on the parcel to which he gained title under said deed; at least, he accepted the deed with the clause therein written. It is evident the grantor did not intend that upon his death, or the death of his heirs, or upon the death of the grantee a reconstruction of his building might be required so as to provide a new means of access to the second-story, and it is clear that the original grantee, looking toward the erection of a building on the north parcel, did not have in contemplation that the original grantor should make such change in his building, for if such intention was present it is not shown by the language used. When people build blocks they construct them with a view to permanency, and do not contemplate any change in the same, especially as to their means of ingress and egress to and from the upper stories.

It is contended by the plaintiffs with much force that the word "assigns" or other words meaning subsequent owner was omitted purposely, and that therefore the clause can not be construed as a covenant running with the land, and, furthermore, that since in its language it speaks of a "condition," that has a strong tendency to show that the parties intended a condition and not a covenant. But a review of the authorities on this subject shows clearly that the court must look first to the intention of the parties, and if the proper words were not written to express that intention, to read them into the instrument.

"It is true that the word 'proviso' is a proper one to constitute a common law condition in a deed or will, but this is not

the fixed and invariable meaning attached to it by the law in these instruments. On the contrary, it gives way to the intention of the parties as gathered from an examination of the whole instrument and has frequently been thus explained and applied as expressing simply a covenant or limitation in trust." (5 Wallace, 119, at page 166.)

"A clause in a deed of land reciting that the grant is on the 'express condition' that the grantee, his heirs or assigns shall not thereafter maintain a nuisance on the premises, does not create a condition subsequent, but a covenant running with the land." (24 N. E., 1013.)

"Although the words of the clause in question are apt to describe a condition subsequent, reserved by a grantor, we are in no wise obliged to take them literally. In the consideration of what, by the use of these words, was imported into the conveyance, we are at liberty to affix that meaning to them which the general view of the instrument and of the situation of the parties makes manifest. Whether they created a condition or a covenant must depend upon what was the intention of the parties, for covenants and conditions may be created by the same words." (22 N. E., 145, at page 146.)

"It seems to be well settled in law that if a covenant is not, in nature and kind, a real covenant, the mere declaration of the parties that it shall run with the land will not make it a real covenant, though so stated in the document." (44 S. E., 520, at page 522.)

"The important consideration is, whether the covenant is annexed to the estate and runs with the land. If this be so, the rights and liabilities of those who take the estate and possess the land during the term, flow from a privity of estate, and not from any assignment of right or contract. If the covenant can not, or does not, run with the land, no words of assignment can create a privity of estate; if a privity of estate be created, no words of assignment are necessary. The word 'assigns' could only show that the covenant was intended to run with the land, for if the covenant were otherwise attached to the land and the privity of estate created, as in the ordinary case of covenant to repair, that word is shown by all the authorities not to be requisite to bind the assignee of the lease." (9 O. S., 341, at page 351.)

1913.]

Kratz v. Risch.

“Whether the possession is in fact a condition or a covenant is, in the absence of a clause of forfeiture or of re-entry, a very difficult question to determine. Under such circumstances the same words may be used to create a condition as to create a covenant (130 Mass., 180). The question is one of intention of the parties, to be ascertained from the entire instrument and the circumstances, and not on one of technical language used (4 Kent Com., 132).” 4 C.C.(N.S.), 369, at page 377.

These authorities and many others which might be cited, show that the inquiry should first be as to what was the intention of the parties, and after a careful consideration of all the circumstances as shown by the evidence and the language used in the instrument, I can come to no other conclusion than that the parties intended a continuing covenant, one running with the land.

It is urged by the plaintiff that the subject-matter is not such as can be construed to be a covenant running with the land. A very good definition of a covenant running with the land is to be found in 26 N. E., 198, at page 199:

“When an instrument conveys or grants an interest or right in land, and at the same time contains a covenant in which a right attached to the estate or interest granted is reserved, or when the grantee covenants that he will do some act on the estate or interest granted which will be beneficial to the grantor, either as respects his remaining interest in the lands out of which an interest is granted, or lands adjacent thereto, such covenant is one which may become annexed to, and run with the land, and bind its owners successively. When such grant is made, and contains a covenant so expressed as to show that it was reasonably the intent that it should be continuing, it will be construed as a covenant running with the land. A covenant which may run with the land must have relation to the interest or estate granted, and the act to be done must concern the interest created or conveyed.”

It will be noted that the clause in question does not contain any words of defeasance or of forfeiture or re-entry. This would show that the parties did not intend a condition subsequent, as contended for, for it is clearly the law of Ohio that such words showing a forfeiture should be placed in the instrument in order to work a defeasance.

It is true that courts are inclined to construe a condition subsequent in preference to a condition precedent, but at the same time conditions subsequent are not favored in law (3 C. D., 175).

Further, it is claimed by the plaintiff that since the duty imposed on the grantee did not result in any benefit to him, therefore, in law, a covenant running with the land could not be created. This doctrine was clearly enunciated by Judge Gholson in *Masury v. Southworth*, 9 O. S., 347, *supra*, by the use of the following language:

“A covenant to run with the land, must have for its subject matter something which sustains the estate and the enjoyment of it, and is, therefore, beneficial both to lessor and lessee.”

The later utterances of the Supreme Court of this state have, however, clearly overruled that doctrine. I cite the case of *Huston v. Cincinnati & Zanesville Railway Co.*, 21 O. S., 234, reading from page 248, wherein Welch, J., says:

“Does the contract run with the land? Undoubtedly it does. It was an agreement to erect structures upon the land appropriated, and to keep them up so long as that was enjoyed. It was in the nature of a charge upon that land, subjecting it to a servitude in favor of the estate from which it was to be taken. It went to lessen the value of the one and enhance the value of the other.”

Again, in *Railway v. Bosworth*, 46 O. S., 81, reading from page 86:

“Many cases are to be found where affirmative covenants have been held to run with the land, on the ownership of which the burden of performing them is imposed.” (Citing *Huston v. Railway Co.*, *supra*.)

This subject is fully treated in the case of *Burbank v. Pillsbury*, 48 N. H., 475 (97 Am. Dec., 633).

Again I quote from 11 Cyc., 1087, citing generally the law of other states as well as cases referred to from Ohio:

“It has been thought that in no case will a covenant imposing a burden pass with the land so as to bind a subsequent owner, but

1913.]

Kratz v. Risch.

the overwhelming weight of authority is to the effect that where there is the requisite privity of estate, and the covenant is connected with or concerns the land or estate conveyed, it will run with the land as readily as one conferring a benefit."

I take it that the law of this state now is in full accord with the doctrine last cited. Neither is the objection that this agreement falls within the rule or rules of *Spencer's case* of avail. Our Supreme Court in *Huston v. Railway Co.*, *supra*, held that an agreement to erect structures upon land was a covenant running with the land, and the court evidently paid no attention to that old common law fiction.

But if we are to be governed by the rule or rules in the *Spencer case* it can be said that the evidence shows that at the time the deed was made there was a means of access to the second story of the building, although the original stairway is not now in existence.

Something has been said in argument that the instrument was drawn by eminent counsel, but it would be a dangerous rule to announce that in the construction of a written instrument resort could be had to the ability of the parties who it is claimed drew the instrument. Many lawyers of ability have made grievous mistakes in the drawing of instruments, and whether or not the words employed in the deed in question were the exact words of the lawyers whose names appear upon the deed is not in evidence. It has been found that the only rules by which an instrument is to be construed are first as to the intention, and in case of ambiguity, aided by the surrounding circumstances.

I am much impressed by the language used in the case of *Teachout v. Duffus*, 119 N. W., 983, where the court had under consideration a driveway established on a boundary between adjoining lots and in which the court say:

"That the driveway in question was an apparent and visible easement belonging to the property conveyed to the plaintiff's grantor, does not admit of doubt, and if it is reasonably necessary for the use of his property he is entitled to its continuance. If the driveway were to be now closed, the plaintiff would be compelled to make substantial changes in his house and grounds, all of which would be a serious damage to his property. We

reach the conclusion, therefore, that the driveway is reasonably necessary for the fair enjoyment of the plaintiff's property and that he had the right to continue its use."

While the facts in the case last quoted are not the facts in this case, still the original grantee knew that the stairway to the second story of the building of the grantor was upon his land, and any subsequent purchasers of the property, if they had investigated the location of the premises, which they probably did, could have ascertained that the means of access to the second story was upon the lands which they were purchasing. For aught that appears, when the original deed was made the fact of the servitude of the north parcel might have been taken into account in the consideration paid. Here was a stairway which was visibly apparent to anyone who might be investigating the situation.

I have carefully examined the cases cited by counsel and I find that the parties intended a covenant running with the land, that the subject-matter is such as can be constituted such covenant, and that the law does not prevent the putting into effect the obligations intended by the parties to the original deed.

The petition must, therefore, be dismissed at the plaintiff's costs, and the appeal bond will be fixed at \$100.

### **HORSE INJURED IN A TOLL GATE.**

Common Pleas Court of Hamilton County.

**SHERMAN APPLGATE V. THE CINCINNATI & HARRISON  
TURNPIKE COMPANY.**

Decided, November 30, 1912.

*Negligence—On the Part of a Toll-road Company—In Blocking the Way  
By Leaving the Gate Down at Night.*

Injury to the horse of a traveler on the highway from leaving a toll gate down at night without lights or other warning, constitutes a cause of action.

*Schorr & Wesselmann, for plaintiff.*

*Clore, Dickerson & Clayton, contra.*

1913.]

Newark v. Railway.

O'CONNELL, J.

The horse of the plaintiff was injured by being driven at night against a toll gate belonging to the defendant company, which had been lowered by the keeper and kept down without light or other warning. Plaintiff had used the toll road for many years, both by day and night, did not pay each time as he passed, but paid his bills monthly, and had never before known the toll gate to be lowered. He claims to have exercised due care.

The defendant demurs, and relies upon the fact that it was operating under a charter granted upwards of eighty years ago, permitting it to establish the toll gate, to collect toll, and that it is not liable for an injury such as the one complained of.

The demurrer is not well taken, because the petition does state facts sufficient to constitute a cause of action. In assuming to collect toll and to grant owners of vehicles the right to use its road in return therefor the defendant company rendered itself liable in damages for any injuries caused by its own wrongful acts. The demurrer should be overruled.

---

### USE OF STREETS BY INTERURBANS.

Common Pleas Court of Licking County.

CITY OF NEWARK V. THE OHIO ELECTRIC RAILWAY CO.

Decided, January Term, 1912.

*Franchise of an Interurban Railway—Does Not Give Right to Use Street for Unloading Freight, When.*

A franchise granting to an interurban railway company the right to run upon tracks laid in certain streets and to "transport passengers, baggage, mail, express, freight and other articles pertaining to the business of said railway company," does not give the company the right to use a portion of one of the streets so designated as a station for loading and unloading freight.

*Jones & Jones, for plaintiff.*

*Fitzgibbon & Montgomery and Durban & King, contra.*

SEWARD, J. (orally).

This is a suit brought to forfeit the franchise of the defendant on certain streets in this city, which was granted to the former owner of the Ohio Electric Railway Company.

The petition alleges that there has been a non-user of Church street, north of the Square, and Second street, and that they are only used for loading and unloading freight.

It is claimed that the defendant has forfeited its right to the franchise on those streets.

An injunction is asked to enjoin the company from using Church street where it is now used for loading and unloading freight. The company claims on the other hand that the right to use Church street, as it is being used, is covered by Section 4 of its franchise.

Section 4 reads as follows:

“The cars to be run upon said track shall be operated by electrical power, or other modern power, except horses or steam, and shall be used to transport passengers, baggage, mail, express, freight and other articles pertaining to the business of said railway company.”

I think that means transportation, and not that the cars may stand there to load and unload. It means transportation from one point to another over the road, and I do not think gives any right to make this portion of Church street a station for loading and unloading cars.

The court does not think this demurrer is well taken, and it is overruled.



1913.]

Gymnasium v. Edmondson.

**TAXABILITY OF ATHLETIC CLUB PROPERTY.**

Common Pleas Court of Hamilton County.

THE CINCINNATI GYMNASIUM & ATHLETIC CLUB v. ROBERT E.  
EDMONDSON, AS AUDITOR OF HAMILTON COUNTY, OHIO.

Decided, November 26, 1912.

*Taxation—Construction of the Phrase “Purely Public Charity”—Property of a Gymnasium and Athletic Club Falls Within that Designation, When—Use to which Property is Devoted Determines Its Character—Section 5353.*

1. The words “public charity only,” as used in Section 5353 of the General Code, must of necessity be given the same meaning as the words “purely public charity” as used in the same connection in the state Constitution and in the sixth paragraph of Section 2732, Revised Statutes.
2. Where property is used for purely public charity, the form or name or character of the organization controlling it is without importance and can in no way affect the question of its taxability.
3. The property of a gymnasium and athletic club, a corporation not for profit, without capital stock or salaried officers, supported by initiation fees and donations in the form of life memberships, open to males of a certain age and good moral character up to the capacity of its facilities, and devoted exclusively to the promotion of good health through physical culture, is property devoted to purely public charity and is not subject to taxation.

*Thorndyke & Capelle*, for plaintiff.

*Pogue, Campbell & Groom*, for the auditor.

DICKSON, J.

The issue is—Is the property of the plaintiff, the Cincinnati Gymnasium & Athletic Club, being two parcels of real estate, one in the center of the city of Cincinnati, Ohio, and the other on the outskirts thereof, taxable? The defendant auditor seeks to compel payment of taxes on this property, heretofore on the exempt list, because all real and personal property must be taxed, unless exempted from taxation by the Constitution of

Ohio or its appendant, the General Assembly, and cites the Constitution, Article XII, Section 2:

“Laws shall be passed taxing by a uniform rule \* \* \* all real and personal property \* \* \* but, \* \* \* houses used exclusively for public worship, institutions of purely public charity, public property used exclusively for any public purpose, \* \* \* may by general laws be exempt from taxation.”

And, also, Section 2732 of the Revised Statutes, as amended by Act of May 9th, 1908, Ohio Laws, V. 99, p. 449:

“The following property shall be exempt from taxation.  
\* \* \*

“Sixth. All property belonging to institutions of purely public charity \* \* \* and all moneys and credits appropriated solely to sustain, and belonging exclusively to said institutions.”  
\* \* \*

The General Code, Section 5353, passed February 14, 1910, approved February 15, 1910, reads:

“Lands, houses and other buildings belonging to a county \* \* \* and property belonging to institutions of public charity only shall be exempt from taxation.”

Purely public charity has been changed to public charity only. It is difficult to see why this change was made. If the new phrase be intended to have a different meaning from the old it is against the Constitution and void. The new means the same as the old—is read with it, into it, or it is void. If void the old phrase remains. We shall construe the law to be “purely public charity,” the language of the Constitution.

The auditor says the property of the plaintiff is not exempt under any law and has placed it on the duplicate.

The plaintiff asks that the defendant auditor be enjoined from asserting any taxation rights against this property because it is an institution of purely public charity and its property is exempt under the act of May 9th, 1908, *supra*.

The issue, in another form is, is the plaintiff, the Cincinnati Gymnasium & Athletic Club, an institution of purely public

1913.]

Gymnasium v. Edmondson.

charity? The word institution means either the organization or its property. There is no provision to tax the organization, hence the law must mean to tax the property. Where property is used for purely public charity the form or name or character of the organization controlling it is not important and can in no way affect its taxability.

The issue demands an interpretation of each of the three words, purely—public—charity. First in importance is: what is meant, in law, by the use of the word charity?

Charity is not strained, is unlimited, is not alone aid to the needy, is rather, broad; means love, the brotherhood of man, and embraces, includes, all which aids mankind and betters his condition. Profanely, the chief end of man is a sound mind in a sound body. The one depends upon the other—can not survive without the other. Therefore everything which tends to produce this end aids mankind, is love, brotherhood—charity.

Plaintiff does not claim to be an institution of learning—an aid to the sound mind; but rather to be an institution of physical culture, calisthenics, hygienes, including bathing, swimming—an aid to the sound body.

Institutions of learning have long been held fit for charity. In recent years culture of the body has become a part and parcel of institutions of learning—a necessary adjunct thereto, and the court does not see why there can not be then an institution of physical culture separate from one of learning and quite as fit for charity.

And second: what is meant, in law, by the use of the word public? Public does not mean free; but rather that which is open to a class or kind on equal conditions, or rather where all may go who can comply with certain necessary and reasonable requirements—restrictions.

And third: what is meant, in law, by the use of the word purely? After having defined public as not free, and charity as an aid to mankind, rich as well as poor, the word purely has little meaning, little relevancy and little significance. At all events, it means something different from exclusive, because exclusive is used in the Constitution when speaking of public wor-

ship, public property, and manifestly means something less strict.

Every charitable institution must have support—must have money either from the state, or from gifts, or from its own earnings, or from all three. An institution supported exclusively by its own earnings may be purely public charity, and its moneys and credits and its property exempt from taxation. Clearly the Constitution in its present form does not intend that an institution otherwise fit which has even a small earning capacity, or has any restriction as to membership, shall forfeit its right to be classed as an institution of purely public charity, and thus its right to exemption. If this were the law, the property of every charitable institution in Ohio would be listed for taxation.

Is the plaintiff an institution of purely public charity? It is a corporation organized not for profit. Its purpose is to maintain a gymnasium and athletic grounds where the culture of the body is taught—to obtain physical improvement. It has no capital stock. It has no salaried officers—only servants or employes. It is supported by nominal initiation fees and dues and by donations in the form of life memberships. The membership is limited, but only to capacity of its property. Males above a certain age and not diseased or immoral are admitted. The membership has no pecuniary value.

A small charge is made for the use of billiard tables, but only sufficient to maintain them. Certain athletic goods are sold to members at a price only to cover the cost, and chiefly sold by the institution to insure uniformity in kind among its members. Exhibitions are held at which a charge of admission is made, but only to cover the necessary expenses. The athletic grounds are occasionally rented to encourage culture of the body in the vicinity, and the rental is only nominal to cover expenses in keep of grounds, with no view to profit.

The evidence clearly shows the institution has kept within its class as a corporation not for profit. Any charges which have been made are simply incidental and subsidiary to its use—the cultivation of the body—and never with a view to profit.

This court has held that the purpose of the institution is purely public charity and the court must hold from the evidence

1913.]

Gymnasium v. Edmondson.

that the property in question has been used for a purely public charity. This property is neither held nor used for the purpose of profit. If any part of this property—that is the real estate, not money or credits—were set apart to produce an income or to be held as an investment, that part would not be exempt.

Exhibitions by its members have been held in public halls to make a profit for the plaintiff. Such exhibitions could in no way affect the property under discussion.

From the evidence the court finds that the athletic field in the outskirts of the city is used for the same purpose—cultivation of the body, but outdoors—as the down town property.

The court finds that the equities are with the plaintiff and grants the prayer of the petition. Let an entry be made accordingly.

Some of the leading cases on the questions raised are:

*The Cleveland Library Assn. v. Pelton*, 36 Ohio St., 253:

Syl. “A library association incorporated under the laws of this state whose objects and purposes are ‘The diffusion of useful knowledge and the acquirement of the arts and sciences, by the establishment of a library of scientific and miscellaneous books for general circulation and a reading room, lectures and cabinets open to all persons, without distinction, upon equal terms, and the income and revenues of which are devoted exclusively to such objects and purposes is an institution of purely public charity,’ within the meaning of the sixth clause of the act of March 21, 1864. S. & S., 761.”

*Gerke, Treasurer, et al v. Purcell*, 25 Ohio St., 229:

Syl. 3. “The fact that the use of the property is free, is not a necessary element in determining whether the use is public or not. If the use is of such a nature as concerns the public, and the right to its enjoyment is open to the public upon equal terms, the use will be public, whether compensation be exacted or not. Whether the use is free or not, becomes material only where some other element is involved than that of its public character, as, for instance, whether the use is charitable as well as public.”

Syl. 4. “A charity in a legal sense, includes not only gifts for the benefit of the poor, but endowments for the advancement of

learning, or institutions for the encouragement of science and art, without any particular reference to the poor.”

Syl. 5. “Schools established by private donations and which are carried on for the benefit of the public, and not with a view to profit are ‘institutions of purely public charity’ within the meaning of the provision of the Constitution which authorizes such institutions to be exempt from taxation.”

Syl. 6. “The Constitution, in directing the levying of taxes and in authorizing exemptions from taxation, has reference to property and the uses to which it is applied; and where property is appropriated to the support of a charity which is purely public, the Legislature may exempt it from taxation without reference to the manner in which the title is held, and without regard to the form or character of the organization adopted to administer the charity.”

Page 247:

“But when private property is appropriated to the support of education for the benefit of the public without any view to profit it constitutes a charity which is purely public. When the charity is public the exclusion of all idea of private gain or profit is equivalent in effect to the force of purely as applied to public charity in the Constitution.”

*Davis, Auditor, v. The Cinti. Camp Meeting Assn.*, 57 Ohio St., 257:

Syl. “Where an association organized and conducted for the purpose of a purely public charity, as a camp meeting, under the supervision and control of some church, owns real estate devoted exclusively to the same use, and thereon provides privileges for the comfort and convenience of those who may attend the meeting, the fact that it makes charges for the use of those privileges, does not subject its property, nor the privileges so provided, to taxation under the laws of this state.”

*St. Paul's Church v. Concord*, 75 New Hampshire, 420:

Syl. “A house of public worship is not taxable merely because it is used sometimes for secular purposes, when not needed for the religious exercises to which it is primarily devoted, nor because it is occasionally and temporarily occupied for entertainments by parties who pay for the privilege.”

1913.]

Gymnasium v. Edmondson.

At 426:

“It is urged that the fact that the plaintiff receives pay for the use of the audience room for entertainments brings the property within the taxable class. But that circumstance is not of controlling effect. It is the use made of the property that determines its character under the statutes. \* \* \* While it may be true that church property leased to and permanently occupied by others for business purposes would not be exempt (*Y. M. C. A. v. Keene*, 70 N. H., 233; *Portsmouth Shoe Co. v. Portsmouth*, 74 N. H., 222), it does not follow that an occasional and temporary occupation by third parties who pay for the privilege deprives the property of its non-taxable character.”

*Commonwealth v. Young Men's Christian Association*, 116 Ky., 711:

Syl. 2. “A Young Men's Christian Association organized to endeavor to bring young men under moral and religious influences to aid them in selecting suitable boarding places, and securing employment, and by other means to surround them with Christian influences, and actually engaging in such work and also furnishing instruction, keeping open libraries, gymnasiums, lists of boarding houses, etc., and membership in which it not transferable, giving no property right, the membership fee being merely nominal is an institution of purely public charity within the Constitution, Section 170, exempting property of such institutions from taxation.”

At page 721:

“The institutions (Y. M. C. A.) have memberships from which a nominal fee is exacted, many if not most of their privileges are restricted to their own members. But the members have no property right, or at most but a qualified and temporary one in the buildings or funds of the associations. They receive no profit or dividends. Certificates of membership are not transferable and have no money value.”

Counsel on both sides have ably discussed orally and in briefs these cases, and Mr. Thorndyke, of Thorndyke & Capelle, cited the following authorities:

Constitution of Ohio, Article XII, Section 2; 61 Ohio Laws, page 39, Section 3; 80 Ohio Laws, page 95; 91 Ohio Laws, page

393; Section 2732, Revised Statutes: Section 5353, General Code; Gerke v. Purcell, 25 Ohio St., 229; Library Assn. v. Pelton, Treas., 36 O. S., 253; Davis, Auditor, v. Camp Meeting Assn., 57 O. S., 257; The United Presbyterian Theological Seminary of Xenia, Ohio, v. Little, Treas., 2 O.C.C.(N.S.), 540; Little v. Treasurer, 72 O. S., 417; Opinions of Attorneys General of Ohio—Vol. 4, page 102, Watson; Vol. 3, page 673, Lawrence; Vol. 5, page 660, Sheets & Todd; Vol. 7, page 711, Sheets; Vol. 4, page 600, Richards; 1910-11, page 615, Denman; 1907-8, page 124, Ellis; 1910-11, Nov. 17, Denman; Vol. 3, page 813, Kohler; 1912, April 1, Hogan; German Gymnastic Assn. v. City of Louisville, 117 Ky., 958; Commonwealth v. Y. M. C. A., 116 Ky., 711; First Unitarian Society v. Hartford, 66 Conn., 368; St. Paul's Church v. Concord, 75 N. H., 420; Price v. Maxwell, 28 Pa. St., 23; Donohugh's Appeal, 86 Pa. St., 306; Missionary Society v. Receiver of Taxes, et al, — Pa. St., 456; Yale University v. New Haven, 71 Conn., 316.

Mr. Charles A. Groom, Assistant Prosecuting Attorney of Hamilton County, cited the following authorities:

Constitution of Ohio, Article XII, Section 2; Section 2732, Revised Statutes, as amended 99 O. L., 449; Section 5353, General Code; Section 5354, General Code; Watterson v. Halliday, 77 Ohio St., 150, at 176, at 170; Gerke v. Purcell, 25 Ohio St., 229; Kenyon College v. Schnelby, 12 O.C.C.(N.S.), 1 (affirmed 81 Ohio St., 514); Allen v. Russell, 39 Ohio St., 336, 337; State v. Bumgardner, 45 Ohio St., 304-308; Lee, Treas., v. Sturgis, 46 Ohio St., 153, 159; Railroad v. Supervisors, 93 U. S., 595; Am. & Eng. Encyc. of Law, 2d. Ed., V. 10, p. 444, note 2; Boys' School v. Gill, 145 Mass., 146; Matter of Civil Engineers, 19 Q. B. Div., 610; Y. M. C. A. v. Mayor of New York, 113 N. Y., 187, at 189; Stephens Institute v. Bowers, 78 N. J. L., 205, at 207; Commissioners of Ham. Co. v. J. B. Mannix, 11 Bul., 184, at 185; Theological Seminary v. People, 101 Ill., 578; Morning Star Lodge v. Hayslip, 23 O. S., 144, at 145; Am. & Eng. Encyc. of Law, 2d. Ed., Vol. 12, p. 343, and cases there cited; Y. M. C. A.



1913.]

Hulshizer v. Railway.

v. City of Patterson, 61 N. J. L., 420; Cincinnati College v. State, 19 Ohio, 110; Sisters of Peace v. Westervelt, 64 N. J. L., 510; Philadelphia v. Masonic Home, 160 Pa. St., 572.

### MAINTENANCE OF FENCES ON RAILWAY RIGHTS-OF-WAY.

Common Pleas Court of Licking County.

ANDREW HULSHIZER v. THE B. & O. R. R. Co.

Decided, January Term, 1912.

*Railways—Liability for Insufficient Fence on Right-of-way—Agreement Made by Predecessor in Title, Upon Subdividing His Tract, to Maintain Fence Not Available to the Railway Company—Section 8918.*

Liability of a railway company for live stock killed by a train is not defeated by an agreement on the part of a predecessor in title to build and maintain a right-of-way fence, in the absence of an averment by the railway company that compensation for the building of the fence was taken into account and made a part of the consideration to be paid to the land owner by the railway company at the point where the stock was killed.

*Smythe & Smythe*, for plaintiff.

*Kibler & Kibler and Durban & King*, contra.

SEWARD, J. (orally).

This case is submitted to the court upon a demurrer to the second defense. The demurrer raises an interesting question. The suit is brought to recover damages for a number of sheep which got through a fence where it was defective, or was down, and were killed by a train belonging to the railroad company. It is submitted to the court upon a demurrer to the second defense, which reads as follows:

“For a second defense, defendant says that at the place where the sheep mentioned in the amended petition got access to the railroad right-of-way, said right-of-way and the land ad-

joining the same, from which said sheep passed on to said right-of-way, was formerly one tract of land, and that the owner thereof, for a valuable consideration, granted said right-of-way to the predecessor in title to the present owner of said right-of-way, and agreed to build and maintain the right-of-way fences, which said grant was duly recorded in the deed records of said Licking county, and the title to said adjoining real estate has since passed by successive conveyances to the owner thereof at the time said sheep were killed."

This demurrer raises the question as to whether that allegation makes a defense to the cause of action alleged in the petition.

In support of the demurrer, the plaintiff cites the 27th O. S., at page 240, and the 40th O. S., at page 206, which would seem to be decisive of the contention raised by the answer and the demurrer, if it were not for the fact that the statute had been amended.

Prior to 1859, a railroad company was not required to build or maintain a fence along the right-of-way. The defendant relies upon the Wood case in the 47th O. S., at page 431, and upon Section 3329 of the Revised Statutes (8918 of the General Code). This act was passed April 18, 1874, amending Section 4 of the act of March 25, 1859, and is the first act which required a railroad company to build and maintain a fence along its right-of-way, and made a railroad company liable in case stock got upon the right-of-way and were injured, whether the company was guilty of negligence in managing or running its trains or not. The act of 1859 required the company to build and maintain fences, and made it liable for injuries to animals which might be injured on the track, which were on the track by reason of the want of a fence, or insufficiency of the fence. This continued to be the law until the act of 1874, found in 71 O. L., page 85, when it was amended, by adding these words found in the first clause of Section 8918:

"The provisions of the preceding sections relating to fences shall not apply to any case in which compensation for building a fence has been or may hereafter be taken into consideration, and estimated as a part of the consideration to be paid for the

1913.]

Hulshizer v. Railway.

right-of-way, so far as the fence has been or may be settled or paid for.”

The case in the 27th O. S. was determined under the act of 1859, which did not contain this clause which I have just read, and was in conformity with the statutory law in existence at that time. The case in the 40th O. S. was decided under the act of 1874; but the pleader in the 40th O. S. did not bring his case within the provisions of the amendment, and probably could not do it. I read from the 40th O. S., at page 211, the case of *Railroad Company v. Allen*. The Supreme Court in this case found for the plaintiff, and found that he was entitled to recover the damages alleged in his petition, or such damages as the lower courts found that he was entitled to. The Supreme Court say at page 211:

“We need not here inquire, how far or in what manner, its contract with the Dayton & Southeastern Railroad Company, or the contract between the last named company and Lucas, affected the liability of the railway company to either of said contracting parties. The plaintiff in error can claim no benefit from said contracts, as against Allen, the plaintiff below. Not being an assignee of Lucas [that is important in the determination of this matter], not being a party or privy to said contracts, or connected with them in fact or law in any manner, the rights of Allen are not to be prejudiced by their provisions. In view of the foregoing considerations, and upon a careful examination of the record in this case, we discover no error assigned for which the judgment of the district court should be reversed.”

This was a case where the railroad company—I believe it was the P., C. & St. L. Railway Company—had a right-of-way, and had it properly fenced. It conveyed a portion of its right-of-way to the Dayton & Southern Railroad Company, south of its track, and provided that the Southern Railroad should build and maintain the fence. The Southern Railroad Company failed to maintain a proper fence; the plaintiff's horses got through and one of them was killed. That was under the act of 1874 (71 O. L., page 85) and the Supreme Court held that he was entitled to recover.

The defendant in this case relies upon the 47th O. S., at page 431, which is the Wood case. It went up from Mt. Vernon, or from Knox county, rather. This is a case very much like the case at bar, and the pleader brought himself within the provisions of the section of the statute by using the following language in the allegation in regard to the fence:

“In the third it averred that in the grant of the right-of-way through the lands at the place where the cattle wandered upon the railroad track at the time named in the petition, the owner and grantor of the right-of-way agreed to build and keep in repair fences on both sides of the railroad track [that is not alleged in the case at bar] and such agreement of the owner and grantor was taken into account, and compensation therefor allowed and estimated as a part of the consideration paid by the company for the right-of-way [no such allegation as that is made in the case at bar] and denied any negligence in running the train by which the animals were killed.”

The Supreme Court, in passing upon this case, in distinguishing this case from the 40th O. S., and the 27th O. S., make use of this language at page 435—they are referring to the 40th O. S. and the 27th O. S.:

“It was not a case where the defendant did, or could, aver that compensation for building the fence had been taken into account and estimated as a part of the consideration to be paid the landowner for its right-of-way at the point where the stock got on the track.”

This defendant does not make any such allegation, and the court thinks the demurrer to this defense should be sustained.

1913.]

Brook v. Railway.

**INCONSISTENT THEORIES OF NEGLIGENCE.**

Common Pleas Court of Franklin County.

**EDWIN J. BROOK v. COLUMBUS RAILWAY & LIGHT COMPANY.**

Decided, November 26, 1912.

*Pleading—Disregard of Provision of Code as to Avoiding Repetition—  
Negligence and Inconsistent Averments with Reference Thereto.*

1. The disposition of pleaders to follow the common law method, and in an action for personal injuries allege every conceivable form of negligence possible under the circumstances of the case, is in direct contravention of the provision of the code which requires a statement of the facts without repetition.
2. Recapitulation of all the grounds of negligence contained in the body of the petition at the end thereof, is in violation of the Code forbidding repetition.
3. Where a specific charge of negligence is not coupled with any of the facts alleged in the general charge of negligence, but is inconsistent with the facts so alleged, it will be stricken from the petition.

*T. B. Bolton, for plaintiff.**Booth, Keating, Peters & Pomcrene, contra.***KINKEAD, J.**

This matter is submitted on a motion for leave to file a motion to the third amended petition.

This action is for personal injury alleged to have been sustained by plaintiff while driving his vehicle along the highway, caused by the horse becoming frightened at the street car. The original petition was filed August 23, 1910. A motion to the petition was filed September 24, 1910, containing five grounds, which was overruled.

November 4, 1910, a demurrer to the original petition was filed, which was sustained because the facts stated did not bring the case within the rule of law which gives rise to a liability for injury to a driver of a horse along the highway and along the line of a street railway.

December 9, 1910, an amended petition was filed. December 24, 1910, an answer was filed by defendant to the petition. On March 5, 1912, a second amended petition was filed, to which a motion was filed on April 16, 1912, to strike out a city ordinance, which was sustained May 16, 1912. June 7, 1912, a third amended petition was filed, to which a demurrer was filed June 27, 1912, and overruled October 14, 1912.

In October the defendant filed a motion for leave to file a motion to the third amended petition. An entry was placed on the docket of the court allowing the motion to be filed, which was inadvertently done before the brief of counsel had been filed.

The question raised by the motion is a material one. The cause of action of plaintiff is founded upon two theories of negligence which are inconsistent.

The motion for leave to file motion seeks an order requiring plaintiff to strike out either the language found in paragraph two:

“Well knowing that plaintiff’s horse was nervous and frightened because of the rapid and noisy approach of the same.”

And the same language occurring in paragraph three on page three, or to strike out all of paragraph four on page three reading as follows:

“In failing to notice and observe that plaintiff’s horse was nervous and frightened because of the rapid and noisy approach of the car.”

It seems impossible that the injury could have occurred by the alleged negligence on the part of defendant by knowing that the horse was nervous and frightened, and with such knowledge when, as the petition alleges (page 2), the “car had approached within twenty feet of the said horse, when the motorman in charge of said car carelessly and negligently blew one sharp and distinct blast of the whistle of said car.” and at the same time and as part of the transaction and as a cause of the injury, the motorman had failed to notice and observe that the plaintiff’s horse was nervous and frightened because of the rapid and noisy approach of the car.

1913.]

Brook v. Railway.

If there was negligence which caused the injury, it must have been that the motorman did see the danger to the plaintiff from the fright of his horse, or because he did not.

The theory upon which the demurrer to the third amended petition was overruled was that the alleged negligence of defendants consisted of the observance of the fright of the horse when the car was within twenty feet of the horse, at which time it is claimed the motorman negligently blew his whistle which increased the danger.

The vice of the pleading is that after plaintiff has alleged just how he claims the injury occurred, the pleader recapitulates or repeats the grounds of negligence which he claims in six specifications.

All of these so-called grounds of negligence are repetitions and recapitulations except No. 4, which is, "In failing to notice or observe that plaintiff's horse was frightened and nervous because of the rapid and noisy approach of said car."

This specification of negligence is not coupled with any fact, is a general allegation of negligence which is entirely inconsistent with the facts alleged.

It might well be passed over without notice at this time perhaps, and taken care of by the court at the trial. Counsel on the other hand may contend that they have the right to know what they are to meet, which is true.

The petition, so far as the specifications of grounds of negligence by way of a recapitulation after the facts are stated, resembles too much the common law method still pursued in one of our neighboring states, which is to allege every conceivable ground of negligence that can be imagined to have been committed under the circumstances of the case.

In fact this form of preparation of petition, which is becoming so common in this class of cases, is in direct contravention of the code, which requires the facts to be stated *without repetition*. All of the specifications excepting four are repetitions and are improper.

In response to the argument made by counsel for plaintiff that this case has been delayed so much by the motions and de-

murrers, the court will not take any action now that will cause further delay.

In a very excellent opinion by Dempsey, J., in *Rabenstein v. Cottage Organ Co.*, 8 N. P., 315, it is stated:

“As to the point made that defendants are now barred of this motion because of the interposition of the demurrer first, and a ruling of the court thereon, it may be said that such a rule is not inflexible. The object of such a rule is protection to the court and to litigants from the interposition of dilatory pleas filed for *the delay* only. The rule was never intended to deprive the court of the power to protect itself from being overwhelmed in a maze of irrelevant and useless averment and allegation, and it has always been my understanding that the power is inherent in the court, for the expedition of its own business and the reduction to singleness and certainty of the issues to be tried, of its own motion, to order irrelevant, or redundant or superfluous matter to be stricken out of a pleading.”

And “where a pleading contains inconsistent averments, the pleader will be required to reform.” *Edwards v. Daller*, 8 N. P., 73.

The objectionable matter, viz., the additional matter by way of repetition of the specification of acts of alleged negligence, were not put in the pleading until the third amended petition was filed.

While I am of the opinion that the addition of all the six specifications of alleged negligence are improper as stated, no order will be made in respect to any of them but one.

The order is that the motion for leave to file a motion is overruled. The court of its own motion orders that specification No. 4 be stricken out of the petition. Leave is granted to plaintiff to amend his pleading at bar by drawing a line through the objectionable matter.



1913.]

Sullivan v. Frank.

**LIABILITY OF BROKER TO SELLER OF SECURITIES.**

Superior Court of Cincinnati.

**JAMES E. SULLIVAN V. ARTHUR FRANK AND JESSE O. FRANK.**

Decided, December 2, 1912.

*Sales of Securities—Broker Liable to Seller Upon Default of Undisclosed Purchaser—Measure of Damages Growing Out of the Default.*

1. A broker, who buys shares of stock for an undisclosed third person, becomes personally liable to the seller upon default of his principal.
2. Such broker is not relieved from such liability by making it known that he is buying for a third person, unless he names his principal or discloses his identity so that the seller knows to whom he is selling.
3. In such case, upon default of the principal, the seller may rescind the contract, retain the stock, and recover from the broker the difference between the contract price and the market price at the time of the default.

*Gilbert Bettman*, for plaintiff.*Cohen, Mack & Hurtig*, contra.**PUGH, J.**

On motion for instructed verdict.

The plaintiff, James E. Sullivan, prior to April, 1912, was owner of twelve shares of the capital stock of the Second National Bank, and had authorized Thomas O. Dunlap, a stock broker, to sell them for such price as he could get.

The defendants, Andrew and Jesse O. Frank, were stock brokers and partners under the firm name of A. & J. Frank, and in all the matters of the purchase of the shares of stock hereinafter mentioned, the firm was represented by the defendant, Jesse O. Frank.

On April 9th, Dunlap, the plaintiff's broker, called up the defendants by telephone, and, on being answered by Jesse O. Frank, offered to sell the twelve shares of Second National Bank stock at \$140—which offer was declined.

On the following day, April 10th, Dunlap again called up the defendants and renewed the offer. It was again declined, but Dunlap was informed by Jesse O. Frank that he had a "party" who was "interested" in the stock at \$135 per share. After some conversation, Dunlap proposed to split the difference and sell at \$137.50 per share. The defendant, Jesse O. Frank, replied that he would have to consult "his party," and Dunlap held the line while Frank called up his principal. In a few minutes, Frank reported to Dunlap and said "My party will take it," and this closed the transaction.

Dunlap testified that Jesse O. Frank, at no time during the conversation, mentioned any third person as interested in the matter, or pretended to be acting for any one other than himself. But, for the purpose of passing on the motion now before the court, the account of the deal as testified to by Jesse O. Frank at the trial will be accepted as the true and correct one. His version is the one first above stated.

It is admitted that Dunlap was authorized by Sullivan to sell the stock at \$137.50, and that A. & J. Frank were authorized by their principal to buy at that price.

The twelve shares of stock were specific and identified properly. Sullivan owned no other. The price was definitely agreed upon, and, in the absence of stipulation to the contrary, it was a cash sale—cash on delivery. By custom, which is also admitted, delivery and payment in such cases are to be made next day. The shares were represented by a certificate, then in possession of the seller, and nothing remained to be done by him except to endorse and deliver it to the buyer.

The transaction, on April 10th, was therefore a complete sale. The right of property in the shares passed from seller to buyer, and the former retained only a right of possession, or lien, until payment.

Next day, April 11th, the undisclosed principal was revealed as Mr. Galbreath, President of the Second National Bank. The two brokers, Dunlap and Frank went together to the Second National Bank to meet Galbreath and close the deal. Dunlap had with him the certificate for the shares, properly endorsed,

1913.]

Sullivan v. Frank.

but before tendering the same was informed first by Frank, and then by Galbreath in person, that the latter refused to accept the shares and pay for them. Tender was thereby waived.

These are the main facts—the ones on which the case turns.

It is apparent that Dunlap, the plaintiff's broker, did not believe, at that time, that the defendants had incurred any liability to Sullivan, his principal, because of Galbreath's default. It is probable that the defendants themselves did not intend, at any time, to assume any personal responsibility in the matter, although Jesse O. Frank offered to pay Dunlap's commission if the latter thought that he, Frank, was to blame. But this in no way affects the questions of law arising upon the facts above stated, namely:

Is a broker, who has purchased shares of capital stock for an undisclosed principal, personally liable to the seller when his principal refuses to accept and pay for such shares?

If so, is such broker's liability in any way affected by the fact that, at the time of the purchase, he stated that he was buying for a third person, but did not give the name or reveal the identity of his principal?

The answers to these questions, as shown by the great weight of authority, are that the broker, acting for an undisclosed principal, is personally liable to the seller for the default of his principal, and that he is not relieved from such personal liability by stating that he is acting for a third person. Unless such broker reveal the name of his principal or in some way fix his identity so that the seller may know with whom he is dealing, he will be liable himself as principal. Strictly speaking such obligation is not contractual. It is in no wise dependent on the intention of parties, but is imposed on the broker—or any other agent, under like circumstances—by the law itself. *Wheeler v. Miller*, 2 Handy, 149; *Soutter v. Stoeckle*, 6 W. L. Bull., 182; *Mechens on Agency*, Sections 956, 957; *Story on Agency*, Section 267 (9th Ed.); *Mills v. Hunt*, 17 Wend., 333; *McClure v. Trust Co.*, 165 N. Y., 108.

In such cases, a broker can relieve himself from personal liability by an express stipulation to that effect, but, in this case, there was no such stipulation.

A seller, in event that a buyer refuses to accept and pay for shares of stock sold, may rescind the contract, retain the shares and sue the buyer for the difference between the contract price and the market price on the day of delivery. *Cullen v. Bimm*, 37 Ohio St., 236.

The seller's measure of damages against the agent of an undisclosed buyer would be the same. In this case, the plaintiff has elected to pursue this remedy and accept this measure of damages.

The contract price for the twelve shares of stock was \$1,650. At the time of delivery, there was no market for the stock, nor could the same be sold at all. The entire amount of the contract price may, therefore, he recovered in this action.

At the close of the testimony, the plaintiff moved the court to direct the jury to return a verdict for the plaintiff in the sum of \$1,650. For the reasons just stated, the court has no discretion in the matter and must grant the motion.

The jury, therefore, will be instructed as requested.

---

### PERMITTING PROSTITUTES TO RESORT IN A DRAM SHOP.

Common Pleas Court of Franklin County.

B. BURNS V. CITY OF COLUMBUS.

Decided, November 25, 1912.

*Criminal Law—Ordinance Prohibiting Use of Dram Shop as a Place of Resort for Prostitutes—Prosecution Thereunder—Knowledge on Part of the Keeper as to Character of Habitues—Degree of Proof Required to Establish that Certain Women Are Common Prostitutes—Character Must Be Distinguished from Reputation.*

1. In order to establish guilt on the part of the keeper of a dram shop, under an ordinance making it a punishable offense to "permit such place to be used, frequented or resorted to by [among others] any common prostitute," it must be made to appear from the evidence that the persons named in the affidavit were common prostitutes, and that the defendant had knowledge that persons so using,

1913.]

Burns v. Columbus.

frequenting and resorting to his place were of the character charged; and in the trial of one so accused it is error to refuse to admit evidence that the instructions of the defendant to his employes were to exclude objectionable characters.

2. A common prostitute is a woman who habitually engages in acts of prostitution, and either habitually solicits men to engage in such acts with her, or habitually resides in a place kept for that purpose, or who holds herself out as one who is willing and anxious to engage in acts of promiscuous prostitution.
3. The evidence required to place a woman within the designation of a common prostitute relates less to individual acts than to general conduct and behavior characteristic of one plying that avocation.
4. Under the Columbus ordinance evidence relating to women of questionable behavior must go to the question of character rather than reputation; and the practice of seeking to establish lewdness by the testimony of police officers as to reputation, without further evidence as to facts and circumstances upon which such reputation is based, is to be severely condemned.

*C. D. Saviers*, for plaintiff in error.

*H. N. Schlessinger*, contra.

KINKEAD, J.

This is a proceeding in error wherein plaintiff in error seeks to reverse a conviction in police court under Section 328 of the codified ordinances, which is as follows:

“Any keeper of a dram shop, beer house, or other place of public resort in this city, *who shall permit such place to be used, frequented or resorted to* by any riotous, noisy or disorderly persons, by any gambler or *common prostitute*, or permit any breach of the peace or disturbance of public order and decorum, by noisy, riotous and disorderly conduct on the premises, *when it was in his power to prevent it*, or who shall sell any intoxicating drinks to any person already intoxicated, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, be fined not less than \$25 nor more than \$250.”

The affidavit filed against the plaintiff below charges:

“That on or about the 16th day of July, 1912, and on divers other times and occasions between that and the 28th day of August, 1912, at the City of Columbus, County of Franklin and State of Ohio, being then and there the keeper of a certain beer

house and wine room, a place of public resort in said city of Columbus, Ohio, No. 22 West State street in said city, did unlawfully *permit* such place to be *used, frequented, and resorted to*, during said time by certain common prostitutes, to-wit" (naming them).

The evidence shows that Burns is the proprietor of the American House, and that he runs a saloon in connection therewith. Adjacent to the bar room and upstairs is a large room capable of seating one hundred and more persons where liquors and cold and hot lunches are served to the public.

In "polite language" counsel say, the room would be termed a grill room, but described in police circle language it is a wine room, or a beer house.

The question presented is whether Burns may be convicted of being a keeper of a beer house and wine room where he *permitted* such place to be used, frequented and resorted to by certain common prostitutes.

The claims urged on behalf of plaintiff in error are the following:

1. That the language of the ordinance "*who shall permit* such place to be *used, frequented or resorted to* by common prostitutes," contemplates or means that to find one guilty of such offense it must appear that the accused had knowledge of the *character* of the persons frequenting or resorting to such place, and assented thereto.

2. That "*permit*" as used in the ordinance donotes a decided or express assent or license, that common prostitutes, known by the accused to be such, are permitted to *use, frequent or resort* to his dram shop, beer house, or other place, etc.

3. Another question arises (which counsel do not present), whether it must be made to appear by the evidence that the accused had *power to prevent* common prostitutes from frequenting or resorting to his place.

4. It is claimed that the accused can not be convicted of violating the ordinance by evidence that the persons who used, frequented or resorted to the place are common prostitutes by mere reputation.

1913.]

Burns v. Columbus.

5. That *used* contemplates an accustomed or habitual use.
6. That frequently means habitually.
7. That resorting to such place means habitually frequenting the place.

Counsel for defendant in error claim that all questions in this case have been determined by the circuit court in the Daniels case, No. 2970.

In the latter case the same ordinance was involved.

The common Pleas court had determined in that case that a conviction could not be supported in respect to common prostitutes solely by evidence of their general reputation. The circuit court reversed because the distinction between character and reputation was overlooked, and because there was testimony of police officers specifically directed to the character of the women frequenting the place, and also as to specific conduct in the wine room and public bar room as to the loitering and indiscriminate association, from which the reasonable inference might be drawn as to their character, such testimony being uncontradicted.

It is claimed that there is some such testimony in this record attention being called to page 30. We do not think so.

There is not any testimony as to the loitering and indiscriminate association, so that in some respects we do not feel entirely bound by the decision in the Daniels case. We have examined the question and the authorities and while perhaps we may express an opinion slightly different from that in the Daniels case, still we feel at liberty to do so because of the difference of the facts in the two cases.

The conviction in this case, if sustained, must rest on proof alone of the reputation of the persons as prostitutes, and want of knowledge on the part of the keeper of their character.

We coincide in the view expressed in the Daniels case as to a keeper of a dram shop being chargeable with certain natural inferences from conduct, but would state the rule more broadly.

We first consider the claim of counsel that the ordinance is invalid, if it shall be so construed as to make a conviction possible thereunder by proof of frequenting the place by evidence

of mere reputations of the persons claimed to be common prostitutes, who are said to have such reputation.

Counsel contended that "the better practice is that a conviction can be based only on the proof of specific acts and that notoriety can not present a presumption of guilt."

The court in that case took occasion to express its opinion on the propriety of conviction of a keeper of such places on testimony of the reputation of the frequenters of the place.

"It is," say the court, "in our opinion competent for the Legislature or common counsel in prescribing police regulations of public resorts to base the regulation upon the common character or general reputation of the frequenter.

"The term common prostitute as employed in this ordinance, we think, applies to one, not only guilty of prostitution, but who plies her trade or vocation openly and notoriously, and is therefore, a public character. In this view, we think that common report and general reputation is competent evidence to prove character of the frequenter of the place."

In respect to the opinion thus expressed, which was evidently not what the decision was based on, it may be said that the ordinance in question does not specifically provide for conviction on "common character or general reputation of the frequenter."

Keepers of objectionable places have been convicted on this class of testimony, as evidenced by the authorities (*Wigmore on Ev.*, 1620, p. 1969, note 7). But the court in the Daniels case specially held otherwise that he could not be convicted that is it states that:

"It is not sufficient to prove by rumor or general reputation that Daniels kept the place or that Daniels permitted the characters named to frequent the place so kept. The evidence as to acts by Daniels must be specific."

The court in the Daniels case in expressing its view as to the meaning of the word "common prostitute" has given the view generally followed, though perhaps not so fully stated.

It is held by some authority that "a municipal corporation can not declare one whose known character is that of a prostitute



1913.]

Burns v. Columbus.

guilty of an offense.” *Paralee v. Camden*, 49 Ark., 165; *People v. Pratt*, 26 Hun., 300; *Delano v. State*, 66 Ind., 348; 2 *McClain Cr. Law*, par. 1133; 28 *Cyc.*, 710; *Freund on Police Power*, par. 96. See also opinion in *Hammond v. State*, 78 O. S., 15.

In *Grand Rapids v. Newton*, — Mich., — (35 L. R. A., 226), the court stated that an ordinance limited to places of resort where prostitutes may be presumed to go for immoral purposes, like a liquor saloon, it may be competent to exclude all having the reputation of being prostitutes, or it may be competent to require in such case that the proprietor see to it, at his peril, that none having that reputation in fact congregate at or visit his place of business. \* \* \* The power to exercise stringent regulation of the liquor traffic has been frequently recognized, and arises out of the necessities of the case. The courts recognize the fact that such places furnish facilities for unlawful conduct, and hence that regulation of such business is proper, and this court would hesitate to pronounce unreasonable stringent regulations based upon the necessity of control arising out of this condition.”

This was *dictum*, but we adopt the reasoning which is sound and applicable in a case when there is proof of circumstances which justify its applicability, although we do not find any such evidence in this case, and hence our expression is *dictum*.

We are not ready to hold that visitation by females of wine rooms is to be considered *per se* evidence warranting the inference that they are common prostitutes. There should, according to the decisions, be evidence of conduct and actions, from which inferences may be drawn.

We think a definition may be framed of a common prostitute by a consideration of all the authorities which ought to apply to the ordinance in question, as well as to the one prescribing the misdemeanor of being a common prostitute.

A common prostitute is one who is habitually engaged in acts of prostitution and who either habitually solicits persons to engage in acts of prostitution, or who habitually resides in a place kept for that purpose, or which is known to be kept for that purpose; or it is one who holds herself out as a person who

is anxious and willing to engage in acts of prostitution either by her habitude in a known place of prostitution, or by acts, conduct or signs, whose meaning men of like disposition instinctively know or understand, and who frequents places where the natural and apparent purpose and tendency (considering the character and reputation thereof as where men and women of a class habitually frequent) is to afford opportunity to such class of women to ply their trade or vocation openly and notoriously thereby becoming public characters.

It will never be required that testimony of specific acts of prostitution shall be produced, other than that showing acts, place and opportunity where the natural inference and deduction is that an act of prostitution is committed.

The spirit and intent of the law concerning this matter, so far as it is regulated by statute or otherwise, is to regulate the conduct of that class of persons who in some way (commonly understood by the classes interested) prostitute themselves by acts of illicit sexual intercourse with men generally as a business or means of livelihood. This may be manifested by habitual presence on the street by a personal appearance which is noticeable and generally understood, or by habitual appearance at wine parlors, habitually frequented and resorted to by both sexes under circumstances and conditions and attended by such conduct as to reasonably cause those familiar with such matters to believe them to be common prostitutes, and to make it clear by casual observation that such persons are prostitutes and that such is their occupation.

It is held in *State v. Rice*, 56 Iowa, 431, that:

“Whether or not a woman is a prostitute is a question of fact, which does not alone depend on the number of persons with whom she has had illicit intercourse, but in determining which a jury may consider her general conduct and other circumstances tending to show whether or not she holds herself out to the public.”

A prostitute is a female given to promiscuous sexual intercourse with men for gain, the practice of offering her body to an indiscriminate intercourse with men, the term being applied

1913.]

Burns v. Columbus.

only to the female who has gained that character by a long continuance in the vice of lewdness. *Davis v. Sladden*, 17 Ore., 259; *State v. Stoyall*, 54 Me., 27; *Carpenter v. People*, 3 Barb., 453; *Fahnestock v. State*, 102 Ind., 163; *Sheehey v. Cokley*, 43 Iowa, 185.

If a woman invites or solicits indiscriminate sexual intercourse by word or act or by any device, she is a prostitute. Her avocation may be known from the manner in which she plies it, and not from pecuniary charge and compensation. *State v. Clark*, 78 Iowa, 492.

Such being the light in which the term common prostitute is used, it is readily to be seen that it is not alone the individual acts, or not so much the individual act that is to be considered as it is the general conduct, and other circumstances which tend to show that a female holds herself out to men in general, her avocation being known by the manner in which she plies it.

Considering the ordinance in the light of such conception, it may be said that the evil intended to be reached is that women who are reputed to be common prostitutes, or who are known to be living at a place or in a locality known to be occupied by reputed common prostitutes, or whose general conduct is such as to show that they are holding themselves out to men in general as seeking or soliciting opportunities for promiscuous prostitution, shall not be permitted to use, frequent or resort to the places mentioned.

This is the construction which is placed upon the ordinance, aided by expressions of judicial precedent and by matters of common knowledge.

The purpose of the regulation is to prevent that class of females using, frequenting and resorting to the dram shop or beer house for the purpose of plying their avocation.

To accomplish the objects of the ordinance the specific instances of illicit intercourse are not greater, if as great importance as the general conduct and acts which are clearly indicative of being a common prostitute, as well as the reputation of being such.

The decision in the Daniels case, as before stated, specifically held that "it is \* \* \* competent for the Legislature or common council in prescribing police regulations of public resorts to base the regulation upon the common character or general reputation of the frequenter."

But the ordinance makes no such regulation; it is a question of construction or rather of evidence which the court must decide upon the record of the particular case.

It is for the court to determine in addition to what constitutes a common prostitute, the further rule of evidence by which the fact may be shown.

We have stated the rule by which to determine what constitutes a common prostitute; and this suggests the rule of evidence.

We hold that to make out a case of using, frequenting and resorting to a beer house by a common prostitute, such acts or circumstances may be shown as will justify the reasonable inference of acts of illicit intercourse, and general conduct and circumstances which tend to show that a female holds herself out to men in general for purposes of prostitution.

Or such general conduct and general reputation of being a common prostitute together may be sufficient.

"So far as the offense involved in the issue the kind of persons resorting to it, it is possible to maintain that either their reputation or their actual character is the fact in issue; if the former, then those persons' reputation is, of course, admissible as being in issue; if the latter, then their reputation is admissible under the present exception as evidence of their personal moral character." *Wigmore on Ev.*, Section 1620.

"Having regard to the circumstances from which such reputation arises, and the difficulty of obtaining other evidence in the ordinary way from unimpeachable witnesses, it seems unquestionable that reputation should be admitted as trustworthy and necessary evidence." *Wigmore on Ev.*, Section 1620.

The opinion is expressed that testimony of mere reputation unaccompanied by either of the above classes of evidence is not sufficient to warrant a conviction under the present ordinance.

1913.]

Burns v. Columbus.

Practically the same tests for establishing the fact of one's being a common prostitute are applicable under both ordinances, the one aimed against the female as well as the one relating to the keeper of the dram shop. But the court in the Daniels case thought the principle in 78 O. S., 15, does not apply to the case against the keeper so far as legislation went to provide for his conviction on the general reputation of the frequenter. But we have no such situation here.

The constitutionality of the ordinance was raised in the Daniels case and must be assumed to have been considered and decided.

The remaining question to be considered is whether knowledge of the character of the persons who frequent such places as being common prostitutes must be known by the keeper thereof.

It would seem that there is no room for contention on this point.

The authorities cited by counsel for plaintiff in error are conclusive that the language "who shall *permit* such place to be used \* \* \* common prostitutes, \* \* \* when it was in his power to prevent it," requires that it must be shown that the keeper had knowledge of the character of such persons and consented to their presence there.

If the keeper does not know that a common prostitute is on his place, then he is not guilty of *permitting* such person to use, frequent or resort to his place. 2 *Woolen & Th. on Intox, Liq.*, Section 1100.

*Permit* means to tolerate, to allow by express consent; denotes a decided assent. 30 *Cyc.*, p. 1461; *State v. Robinson*, 55 Minn., 169, 171; *Chicago v. Stearns*, 105 Ill., 554; *Words & Phrases*, p. 5315; *Board v. Board*, 3 Ohio Dec., 70.

*Use* means habitual use. *Begg v. City*, 10 C.C., 199 (39 *Cyc.*, 856).

*Frequent*, means to visit often, to resort to habitually. 20 *Cyc.*, 839.

*Resort*, means the habitual frequenting of a place. 34 *Cyc.*, 1669.

The brief of counsel in an encyclopedia of authorities in support of these views of the terms mentioned.

In considering the record in the light of the rules heretofore expressed, the first question is whether it was made to appear by the evidence that Burns had knowledge of the fact that the persons named in the affidavit were common prostitutes.

The deduction is reasonably evident that there was no evidence charging defendant with knowledge of the character of the persons, either directly or indirectly; that is there was no proof which would be sufficient to charge defendant with knowledge by inference. The case was not tried on any such theory. It has been customary to call police officers to testify as to the reputation of women as being common prostitutes, without further evidence as to facts or circumstances. This practice we condemn, and have undertaken to lay down the rule which we think the law requires should be followed.

We find it to have been error to exclude testimony of directions given by Burns to his employes to exclude objectionable characters.

We have acted on the theory that as the constitutionality of the ordinance was raised in the Daniels case its constitutionality was assumed by the circuit court.

We do not merely assume its validity, but expressly hold, construed as it has been in this decision, that the ordinance is valid.

But for the errors mentioned the decision is that the judgment is reversed.

1913.]

Beckman v. Newark.

**DAMAGES CAUSED BY THE CLOSING OF A STREET.**

Common Pleas Court of Licking County.

CHARLES C. BECKMAN ET AL V. CITY OF NEWARK ET AL.

Decided, January Term, 1912.

*Municipal Corporations—Street Closed by Washing Out of Bridge—Failure of Municipality to Restore Bridge—Action for Damages by a Resident Affected Thereby.*

An action will not lie against a municipality for damages growing out of the closing of a street, where the plaintiff sues on behalf of all the residents of that part of the city affected thereby.

*J. F. Lingafelter*, for plaintiffs.

*Frank A. Bolton*, City Solicitor, contra.

SEWARD, J. (orally).

This is a very peculiar case. Charles C. Beckman brings suit in his own behalf and in behalf of all the residents in the southern part of the city, substantially, seeking to recover \$50,000 damages sustained by the alleged wrongful act of shutting up a street. He says that he brings this suit on behalf of himself and all the inhabitants within a certain territory. That would include the children and everybody else who happened to have a habitation in that particular territory. I do not think the plaintiff can do that. It is a suit for damages. How could the damages be apportioned? What portion would be due to Beckman, and what portion would be due to those whom he claims to represent?

A demurrer is interposed to the petition because of misjoinder of parties defendant and parties plaintiff. I will read the petition:

“Now comes Charles C. Beckman, for himself and the representative of and for all the inhabitants residing south of the Baltimore & Ohio railroad, and the Baltimore & Ohio railroad

shops and east of the North Fork of the Licking river, and north of Licking river in the city of Newark, Ohio, and says that by reason of the closing up of Webb street in the city of Newark, Ohio, across the tracks of the Baltimore & Ohio railroad by the city council of the city of Newark, Ohio, to traffic and pedestrians and the washing out of the west approach of the Vallandigham street bridge in the city of Newark, Ohio, by the flood of North Fork of the Licking river on Sunday, August 15, 1909, and the neglect and refusal of the proper officers of the city of Newark, Ohio, to rebuild said west approach to said Vallandigham street bridge and to re-open Webb street across the tracks of the Baltimore & Ohio railroad in the city of Newark, Ohio, that he himself, and all of the said inhabitants residing south of the Baltimore & Ohio railroad and the Baltimore & Ohio railroad shops and east of North Fork of the Licking river and north of the Licking river in the city of Newark, Ohio, are, by reason thereof, isolated from other parts of the city of Newark, Ohio, from traffic or otherwise to the damage of himself and said inhabitants in the sum of fifty thousand dollars, for which sum, by reason of the facts and matters aforesaid, said Charles C. Beckman, for himself, and the whole of said inhabitants prays judgment against the said city of Newark, Ohio, in said sum of \$50,000, together with the costs of this action, and further pray the court for all further relief that he and said inhabitants may be entitled to in law and in equity by reason of the matters and facts aforesaid."

This petition does not state a cause of action in favor of Mr. Beckman. He assumes to act for everybody who lives in that section of the city, and it is beyond reason that everybody authorized him to act in their behalf in that part of the city. Suppose he recovers the \$50,000? Who is to get it? How much is each one damaged?

This demurrer is sustained and judgment entered on the demurrer. The petition will be dismissed, and exceptions noted.



1913.]

Piano Co. v. Blinn &amp; Co.

**AFFIDAVITS IN REPLEVIN.**

Common Pleas Court of Hamilton County.

**THE LYRIC PIANO COMPANY v. W. H. BLINN & COMPANY.**

Decided, October, 1912.

*Replevin—Affidavit Rendered Void by Being Sworn to Before Plaintiff's Attorney as Notary—Sections 10462, 11524, 11532 and 11356.*

The making of an affidavit in replevin before the attorney for the plaintiff as notary renders the affidavit void, and a writ based upon an affidavit so made must be dismissed.

*Simeon M. Johnson*, for the motion.*Bates & Meyer*, contra.

DICKSON, J.

This is an action in replevin here on an appeal from the justice's court. From the evidence it appears, and the court so finds, that the notary who swore the plaintiff to the affidavit was, at the time of the swearing, its attorney.

The defendant claims and so moves that the action be dismissed because the affidavit, the foundation of the writ of replevin, is void, and thus all of the proceedings thereafter and here are void for want of jurisdiction in the premises, and cites General Code, Section 10462:

“An action for the replevin of property shall be brought by filing in the office of a justice an affidavit \* \* \* showing,” etc.

General Code, Section 10481:

“If a justice of the peace issues a writ to replevin property, as is provided by this chapter, without the proper affidavit being filed in his office, the writ shall be set aside at his costs and he shall be liable in damages to the party injured.”

Also, *Leritt & Mulroy Co. v. Rosenberg Bros. Co.*, 83 O. S., 230:

Syl. 3. "An affidavit in attachment can not be made before a notary public who is the attorney for one of the parties in the action."

At page 239:

"Section 5264, Revised Statutes (General Code, Section 11524), provides that an affidavit may be made before any person authorized to take depositions. Section 5271, Revised Statutes (General Code, Section 11532), provides that the officer before whom depositions are taken must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding. Section 5107, Revised Statutes (General Code, Section 11356), provides that the affidavit verifying the pleading may be made before any person authorized to administer oaths, whether an attorney in the case or not. An affidavit is a written declaration under oath, made without notice to the adverse party, and in view of the very important purposes for which it may be used it would seem that it is just as important that the officer before whom it is made should be disinterested as it is in the taking of a deposition for which notice is required."

And then further, after declaring against amendments, etc., to an affidavit, the court say, at page 241:

"Moreover, if the amendment had been made, still the affidavits would have been fatally defective on the ground that they were made before the attorney."

This court does not see why the reasoning as to an affidavit in attachment should not apply with full force to an affidavit in replevin, hence, holds that the affidavit in this action is a nullity and the writ must be dismissed.

This court is also asked to declare the chattel mortgage in this case void because the affidavit is sworn to before a Kentucky notary. This is a serious question, but the court having held that the writ in this case is void, it is not necessary, at least, now, to pass on this question.

1913.]

Hedley v. Improvement Co.

**LOSS OF CORPORATE STOCK THROUGH LACHES OF  
THE HOLDER.**

Common Pleas Court of Cuyahoga County.

ALICE HEDLEY v. THE LAKE VIEW LAND & IMPROVEMENT  
COMPANY.

Decided, November 9, 1912.

*Equitable Intervention—Denied to a Stockholder Guilty of Gross Laches—Stock Forfeited for Failure to Pay Assessments—Irregularities Not Available to Support a Stale Equity—Knowledge of the Fact of Forfeiture—Intervening of New Rights—Subdivision Owned by a Corporation—Lots Unsaleable for Many Years Finally Become Valuable—Delinquent Stockholder Denied Relief.*

H held stock in a corporation which acquired a tract of land and platted it into lots for a subdivision. The property was without street car facilities, sewers or other conveniences, and for a long period the company was in a precarious condition financially. H took no interest in its affairs and failed to pay assessments levied on her stock. In the meantime the property was taken over by another company with a reduced capital, the old company was dissolved and delinquent stock forfeited. At the end of fifteen years, owing to the growth of the city, the building of a street car line and provision for other improvements, the property had become valuable, and H. filed a petition in equity, praying for a decree declaring that the property was held in trust for the benefit of the stockholders of the old company.

*Held:* That H has slept upon her rights, and notwithstanding some irregularities in the manner of dissolving the old company and cancelling its delinquent stock, a court of equity will not be moved by so stale a claim, in the face of gross laches, to grant the relief which she seeks.

*Wm. Howell*, for plaintiff.

*Frank Higley*, contra.

ESTEP, J.

This action is brought by Alice Hedley, who claims to be the owner of twenty shares of stock of the Lake View Land & Im-

provement Company, a New York corporation. In her petition she sets up, at some length, her complaint against defendant, all to the effect that the transfer on September 16, 1907, of the property of the Lake View Land & Improvement Company, a corporation of the state of New York, to the Lake View Land & Improvement Company, an Ohio corporation, is illegal, being contrary to the laws of the state of New York; and she prays that the directors of the Ohio corporation be decreed to hold the property, so conveyed, in trust for the benefit of the plaintiff and other stockholders of the said New York corporation, and for an accounting, the appointment of a receiver, etc.

To this complaint, answers have been filed by the defendant corporations, in which several defenses have been asserted. Among other defenses are those of laches, a cancellation of the stock back in 1896, and several other defenses, which I will not take the time to fully set out. Reply has been filed taking issue with these defenses.

The Lake Shore Land & Improvement Company, the New York corporation, was organized March 3d, 1893. The corporation was formed for the purchase and sale of real estate, laying out and subdividing the same into building lots and villa plots, maintaining, selling and improving the same. The location of its business was in the city of Buffalo, New York, and in the city of Cleveland, Ohio, and vicinity. The capital stock consisted of 1,120 shares of the par value of \$100 each. The location of its principal business office was in Buffalo. The corporation was the owner of about thirty-five acres of land located on Lake View avenue, partly in the city of Cleveland and partly in the village of East Cleveland. This corporation continued in existence up to December 26, 1907. The Ohio corporation had been previously organized to carry on the same business as had formerly been conducted by the New York corporation; and, as I have stated above, the property of the New York corporation was conveyed to the Ohio corporation on the 16th day of September, 1907, and the business had been carried on by the Ohio corporation up to the present time.

One C. J. Wheelock, since deceased, was the promoter of this enterprise. He originally owned a part of the land included in

1913.]

Hedley v. Improvement Co.

the thirty-five acres acquired by the company. He obtained a large amount of the stock of the company, as a part consideration for his transfer of his land to the company, and was one of the directors of said New York corporation, and was active in its affairs for a few years.

W. E. Hedley, the husband of the plaintiff, had some deal with Wheelock in 1895, whereby he held forty-one shares of stock in the New York corporation, owned by Wheelock. Hedley testified that he held this stock as collateral to a small indebtedness owing to him by Wheelock. These forty-one shares of stock were in three certificates, one for one, one for twenty, and another for twenty shares. Two certificates had written in red ink on the face of the stock the word "assessable"; the remaining certificate, and the one claimed by the plaintiff, had nothing marked upon it. Hedley says that in 1896, he had his wife purchase the certificate No. 4, calling for twenty shares, and not marked assessable; that she paid \$100 for said twenty shares, and that in all subsequent matters relating to said stock he acted as agent for the plaintiff.

It is admitted that Hedley never presented said stock to the corporation for transfer upon its books, and that he never paid or offered to pay any unpaid assessments upon said stock.

As early as October 29, 1895, Mr. Hedley wrote or sent a letter to E. L. Brown, 224 Bank street, Cleveland, Ohio, the secretary of the New York corporation, in which he states that Mr. Wheelock informed him that Mr. Brown had charge of the affairs of the corporation, and that Mr. Wheelock had placed in his hands forty-one shares of stock of the company. In this letter he asks if there are any unpaid assessments against the stock. He also asks for a statement of the condition of the company. This letter was followed by another, of date of February 13, 1896. This was answered by Mr. Brown on February 14, 1896. It was written on paper containing the letter-head of the corporation, and the names of all the officers. It conveyed the information that there were two unpaid assessments upon this stock, and the letter was signed by E. L. Brown, secretary Lake View Land & I. Co. As late as November 21, 1896, Hedley wrote to E. L. Brown, at 224 Bank street, Cleveland, Ohio, ask-

ing for "the record numbers of the certificates of stock belonging to C. J. Wheelock, which were canceled as I heard by the Lake View Land & Imp. Co." This letter was never answered, in so far as the record shows. It appears, however, that the forty-one shares—certificate No. 4 being a part thereof—were all the stock standing in Wheelock's name at this time. It is clear that, as early as 1895, Hedley knew that the principal business affairs of the Lake View Land & Improvement Company of New York were conducted in the city of Cleveland, the place where its property was located. He knew the location of its office, and had correspondence with its secretary at Cleveland. It further appears from the testimony that, as early as February 14, 1896, he knew that there were unpaid assessments upon this stock; and from his letter of November 21, 1896, it appears that he had been informed that the stock had been canceled for non-payment of assessments. From November 21, 1896, to December 12, 1905, nothing further was heard from Hedley. Upon the latter date he wrote John Mitchell, president of the New York corporation, stating for the first time that he held the 41 shares of stock in the company as owner thereof, giving the number of shares, and asked for information as to the condition of the company. On December 15, 1895, President Mitchell enclosed Hedley a letter from B. F. Whitman, treasurer of the company, in which Mr. Whitman states that the stock in question was originally issued to C. J. Wheelock, and by a vote of the board of directors at a meeting held November 14, 1899, was canceled, on account of non-payment of assessments.

In the years 1895, 1896 and 1897, W. E. Hedley was interested in a real estate investment in Cleveland, the property being located on Lorain street. He says he was in Cleveland fifteen or twenty times during this period of time; that he never went near the office of the company, and made no attempt to see or consult the officers of the company; that he never went to see the land owned by the company, and, in short, made no effort, while here, to get any information in regard to the condition and status of the forty-one shares of stock, or to obtain any information in regard to the company. He displayed no interest in the company or its affairs. It further appears that,

1913.]

Hedley v. Improvement Co.

after he received the definite notice in regard to the claimed forfeiture of the stock in question, contained in the letter of B. F. Whitman, treasurer, dated December 14, 1905, Mr. Hedley remained silent again for nearly six years, and then for the first time undertook to assert a claim against the defendants. An action was commenced by the plaintiff at Buffalo against defendants later in 1911, but this action was discontinued, and the present action was filed in this court on April 27, 1912.

The condition of the affairs of the two corporations during this period of time may throw some light upon plaintiff's conduct.

It appears from the proof that the affairs of the Lake View Land & Improvement Company of New York were in a precarious condition for many years. Its land was located so that it had practically no street car service, no proper system of sewers, and few, if any, improvements necessary to make it marketable property.

In 1907, at the time of the taking over of the property of the New York corporation by the Ohio corporation, Mr. Bond, the secretary of the New York corporation at that time, testified that the stock was worth, in his opinion, about \$10 per share. He says that Capt. Mitchell insisted on exchanging one share of stock in the New York corporation, of the par value of \$100, for one share in the Ohio corporation of the par value of \$40, and this plan was carried out. Within the last two years the property has been properly sewered. The Superior street car service has been extended to this allotment, and the land has rapidly increased in value. After carrying this property for nineteen years, during which time the growth of the city has brought to it the improvements mentioned, the property has become valuable, and the stock, at the time this action was commenced, was considerably increased in value.

There are many technical objections urged by the plaintiff against the claimed forfeiture of the stock involved in this action, and I am inclined to think the proceedings may have been somewhat irregular. It also appears that the property of the New York corporation, being the land owned by it and located in this county, was conveyed to the Ohio corporation before the actual

dissolution of the New York corporation. The deed of conveyance was dated September 16, 1907. The final dissolution of the New York corporation occurred on the 26th of December, 1907, although the resolution of the board of directors to dissolve the company was passed on the 16th day of September, 1907, the same date the property was transferred. It is also claimed that the books of the company should have been kept and the main business of the corporation should have been carried on in the Buffalo office. A great many sections of the laws of New York, governing corporations, bearing upon the questions urged, have been placed in evidence.

I might also add that the evidence shows that after a considerable amount of the stock of various persons had been forfeited, regularly or irregularly as the case may be, by the New York corporation, the stock of said company was reduced from \$112,000 to \$90,000, thus eliminating all of the forfeited or canceled stock.

It appears from all the evidence that some of the proceedings relating to the various transactions under consideration have been irregular; and if this case is to be disposed of upon close technical questions, the plaintiff would probably recover. This proceeding, however, is one in equity. The plaintiff is now seeking the equitable intervention of this court in her behalf. Do the facts justify such relief at this time? Has the plaintiff slept upon her rights? In other words, is she guilty of laches?

The facts show, after knowledge of assessments against her stock in 1896, that nothing was ever done by her towards paying the assessments or tendering the same and demanding a transfer of the stock; nor were any legal steps taken by her to assert any rights she may have had. The evidence shows that plaintiff, through her agent, knew, from the year 1896 down to the time of bringing her action in 1912, that the principal business of both corporations was conducted in Cleveland; that the property owned by said corporation was located in or near Cleveland; that the books of the companies were kept in Cleveland, and that the principal officers resided there. The plaintiff's agent was in Cleveland many times after learning of the assessments upon the stock; and the evidence shows that no attempt was made to



1913.]

Hedley v. Improvement Co.

visit the officers of the company or to ascertain the condition of the stock or the company. The undisputed proof is to the effect, that from 1896 to 1911, the plaintiff made no offer to pay the assessments upon the stock, made no request to have the stock transferred to her upon the books of the company, and also made no claim of a conversion of the stock by the company in its efforts to forfeit and cancel the same. It also appears from evidence that during all the years the companies were financing the enterprise, the plaintiff remained quiet; and it was not until the financial success of the enterprise was assured in 1911, that the plaintiff made any claims against defendants. In the meantime the capital stock of the company, by reason of cancellations of stock, including the stock claimed by the defendant, had been reduced from \$112,000 to \$90,300; the old corporation was dissolved, and its property had been conveyed to the new or the Ohio corporation. What, under all these circumstances, should a court of equity do? Is the equitable doctrine of laches applicable?

In the case of *Bridenbaugh v. King*, 42 O. S., 413, Okey, J., says:

“In *Smith v. Clay*, 3 Brown’s Chan., 640, Lord Camden says: ‘A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights or acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence. Where these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced.’”

This language has been expressly approved in *Tuttle v. Wilson*, 10 O., 27; *Pendleton v. Galloway*, 9 O., 180; and *Clark v. Potter*, 32 O. S., 59.

To determine whether a party is guilty of laches, each case must be decided according to its own particular circumstances, taking into consideration all the elements which affect the question. *Kemper v. Appolo Bldg.*, 11 O.C.C.(N.S.), 372.

It has also been held that what constitutes a stale equity depends on the facts and circumstances of each case, and not on lapse of time alone. *Paschell v. Hinderer*, 28 O. S., 569.

In 10 Cyc., 508, the writer, in commenting upon the fact that an illegal or irregular forfeiture of stock has taken place, says that the stockholder is released from his liability for the debts of the corporation, and that the additional liability is imposed upon the remaining stockholders; the text further states:

“It follows that if, with a knowledge that such forfeiture has been allowed, they stand by for a considerable length of time and take no steps to undo it, they will be excluded from relief in equity on the ground of laches.”

The doctrine is also clearly laid down, that the forfeiture, although illegal or defective, is not void but voidable only.

In 4 *Thompson on Corporations*, at Section 3751, the law relating to laches and stale equity is laid down as follows:

“The right of a stockholder to invoke the aid of equity in case of invalid or illegal forfeiture may be waived by acquiescence or delay, and, as in analogous cases, he must act promptly to obtain relief. This doctrine has been applied when stock was wrongfully forfeited and sold with the stockholder’s knowledge at a time when said stock was of little value, but afterwards, by some change of circumstances and the diligence of other stockholders, it becomes valuable, and the original holder then attempted to recover it by suit in equity.” \* \* \*

In answer to the question as to whether this could be done, the author says: “We think not.”

“If the property is of a *speculative* or precarious nature, it is the duty of a man complaining of fraud to put forward his complaint at the earliest possible time. He can not be allowed to remain passive, prepared to affirm the transaction if the concern should prosper, or to repudiate it if that should prove to his advantage.

“It is generally necessary that a bill in equity to redeem or to seek other relief should aver an offer to pay, or should show a willingness to pay the debt. \* \* \* An irregular or defective forfeiture is voidable, but not void, and subsequent acquiescence by the stockholders and the corporations, with knowledge, will estop them from denying the validity of the forfeiture. \* \* \*

“An action for relief to set aside an invalid sale of stock for non-payment of assessments must be exercised within a reasonable time; and what constitutes such reasonable time must be

1913.]

Hedley v. Improvement Co.

decided in each case upon the elements which affect the question.” \* \* \*

In the case of *Raht v. Mining Company*, 18 Utah, 290, it is held:

“A forfeiture of shares of stock, when the forfeiture was irregular or defective in form, is not void but voidable; and, by subsequent knowledge and acquiescence, the shareholder and company are alike estopped to deny its validity. Equity will refuse to assist a stockholder who acquiesces in a forfeiture of his shares as long as they are valueless, and then, when they become valuable by reason of changed circumstances or by the efforts of innocent parties, seeks to be reinstated in the rights which he previously repudiated.”

The case of *Sayre v. Gas Light & Heat Company*, 69 Cal., 207, was a case of sale of stock for non-payment of assessments.

In the action at bar, the stock was claimed by the company to have been forfeited, and was canceled at a time when the stock of the company was reduced. The court in the Sayres case, at page 231, says:

“If the assessment and sale were invalid, he then had the right to commence proceedings to vacate the assessment and sale and recover his stock. The reason he did not do so is manifest from the evidence as well as the findings. By reason of formidable competition that existed to the business of the company, the stock had little or no value, and the prospects of the company were poor. All of this he knew. \* \* \* If he had the right to repudiate the sale of stock upon the ground that it was not assessable, or for any other cause, was it not incumbent on him to act with diligence? Could he acquiesce in the sale as long as the stock was of little value, but when by the exertions of others \* \* \* it became of more value, come into a court of equity and claim an equivalent of the stock of the new company? We think not.”

This doctrine is recognized in *Hayward v. National Bank*, 96 U. S., 611. At page 617, Justice Harlan says:

“Courts of equity often treat a lapse of time, less than that prescribed by the statute of limitations, as a presumptive bar, on the ground of discouraging stale claims, or gross laches, or unexplained acquiescence in the assertion of an adverse right.”  
*2 Story Equity*, 1520.

He also quotes with approval *Smith v. Clay*, which I have already referred to.

See also 91 U. S., 587.

Holding the opinion that the law, as above stated, is the law applicable to this case, as I understand it; and the plaintiff having, during all the years between 1896 and 1911, failed to take any steps to pay any assessment upon this stock, or to have instituted any action to set aside the forfeiture of the stock or to sue for its conversion by the company, or to pursue any remedy in relation thereto, I am of the opinion that the plaintiff has slept upon her rights, and that she ought not now to be permitted to assert her claim against defendant as an alleged stockholder.

Her petition is therefore dismissed.

---

### APPEAL QUASHED FOR IRREGULARITY.

Common Pleas Court of Clermont County.

F. B. COX v. HATTIE HULSMIRE.\*

Decided, 1912.

*Appeal—Statutory Provisions with Reference to Bond on Appeal from Justice of the Peace—Where Signed by a Non-Resident there is in Law no Surety—Sections 10219, 10383, 10394 and 10395.*

A motion lies to dismiss an appeal from a justice of the peace, where the surety on the bond is not, and was not at the time of the giving of the bond, a resident of the state.

DAVIS, J.

The plaintiff commenced his action before a justice, and on trial the justice rendered judgment in favor of defendant. From this judgment plaintiff appealed and within the period prescribed by law attempted to execute bond for appeal. The bond was approved by the justice, and the case is now pending in this court. The plaintiff has filed his petition, and now the defendant moves to dismiss the appeal for the reason that

---

\* Affirmed by the Circuit Court without opinion, October Term, 1912.

1913.]

Cox v. Hulsmire.

plaintiff's appeal bond is not such as required by law, for the reason that the surety is not now, nor was he when he signed the bond, a resident of Ohio. The bond as to form, amount, signing and approval is admitted to be perfect. On the hearing of the motion, it was admitted that Bion Place, the surety on the bond, is now and was the attorney of plaintiff in this case; that he, when he signed the bond, ever since, and now is a resident of Kentucky, and not a resident of this state, although he has an office and practices law in Cincinnati. It was also admitted that financially he is qualified as surety on the bond, being worth more than double the penalty of bond above all debts and homestead exemptions, but has no property in this county or in this state subject to execution. The bond is signed by plaintiff, but as this under Section 10383, General Code, is not required, it does not make it a valid bond without signature of surety.

Part 3 of General Code is remedial and under Title 1, Preliminary, Chapter 1, Section 10219, it is provided:

“Sureties must be residents of this state, and worth in the aggregate double the sum to be secured, beyond the amount of their debts, and have property liable to execution in this state equal to the sum to be secured.”

It is admitted that the bond as it stands is subject to the motion, but it is claimed the defect may be cured and the court is asked to allow plaintiff to file a new bond, and this claim is made under Section 10395, General Code. “In proceedings on appeal, when the surety in the bond is insufficient in form or amount the court, on motion, may order a change or renewal of the bond.” It is also urged that the court should allow this as an amendment to pleading, and in furtherance of justice, and it is claimed that the cases in Ohio on this subject authorize the court to allow new bond to be given.

This motion has been argued orally and briefs submitted. The case of *Masters v. Beebe*, 11 O., 420, is relied on by plaintiff. In that case the bond was defective and it was held that a defective appeal bond, if it contain the substance of a bond, will sustain an appeal so far as to justify an order for a new

bond.” In that case at time bond was executed, the law governing appeals, etc., was to be found in Swan’s Statutes of 1841, at p. 686, Section 4, “and if upon exception taken the bond shall be found defective, either in *form or in any other respect*, the appellate court may order a *new bond* to be given with security.” Judge Burchard in deciding the case refers to this statute and says:

“It is intended to remedy an evil and should be liberally construed, and *as the law stands* any paper coming within the legal definition of a bond, employing that term in its largest sense, however defective in other respects, will, if filed in time, for that purpose sustain an appeal. An instrument without obligor or obligee or in blank as to the sum would be insufficient.”

And leave was granted in that case to file a new bond. The language is strong, but applies to the law *as it then stood*, and it may be questioned whether a paper purporting to be a bond, but signed by one as surety, who is forbidden by law from being accepted as security, can as against the objection of the obligee be said to have executed a bond. True, the party signing might and does bind himself, and can not as held by our courts take advantage of his own wrongful act and so escape, but is the obligee bound, or can the court consider the bond over the objection of the obligee to be valid for any purpose? The law under which the case in 11 O., 420, was decided, was repealed on adoption of the code in 1851, and the law regulating appeals is found in Swan’s Revised Statutes, 1851, page 518, and is Section 122 of code, and an examination of it shows an important change, by leaving out or omitting the words “in any other respect.” The section then reads, “In proceedings on appeal, when the surety in the undertaking shall be insufficient, or such undertaking may be insufficient in form or amount, it shall be lawful,” etc., and thus Section 122, substantially remained unchanged down to the present time and is now Section 10395, General Code. So that it is clear that a much larger discretion was given to the court under the law as it stood when case in 11 O., 420, was decided than now.

1913.]

Cox v. Hulsmire.

By the provisions of Section 10383, General Code, the appeal bond *must be signed* by at least one sufficient surety. To determine who is a sufficient surety recourse must be had to Section 10210. Looking at that section such surety is required to be "a resident of this state and worth in the aggregate double the amount secured," and were it not for the curative provisions of Section 10395, if the surety were worth in the aggregate less than double the amount secured, the bond would not be good; but under Section 10395, such bond while not proper is sufficient to entitle the principal to invoke and receive the aid of the curative provision of the section and permit the court to order a new bond. But it is significant that while Section 10395 permits the court to order a new bond "when the surety on the bond is insufficient, or such bond is insufficient in form or amount" there is no authority given to order a new bond where there is no surety at all, or where the surety is sufficient were he a resident of the state but has no property in this state. To take a bond signed by a non-resident of this state is an irregularity, which Bouvier defines to be "the doing or not doing that in the conduct of a law suit which conformably with the practice of the courts ought or ought not to be done;" and as under Section 10395 it is pointed out when and under what circumstances an amendment or change of bond on appeal may be had; then looking to Section 10394, we find provision for quashing a bond for irregularity, and as the taking of a non-resident of the state is an irregularity, the bond under that section may be quashed.

In the case of *Collins, Excr., v. Mullen et al*, 57 O. S., 291-2, Judge Bradbury calls attention to the liberal principles governing amendment of appeal bonds, and cites many Ohio cases, stating that the court brings to the case under consideration the same liberal principles touching the question of perfecting appeals that by inadvertence had been irregularly taken, saying:

"We recognize however that the courts can dispense with no condition prescribed by the statute as necessary to perfect an appeal, and that the only field open to the display of liberality in this connection is in the construction of the statutes that prescribe the conditions."



And see *Goshorn v. Purcell*, 11 O. S., 641.

The statute prescribing the mode of appeal, required a bond with surety, having certain amount of property, and a resident of the state; by a subsequent section in case the surety in the bond is insufficient, or the bond is insufficient in form or amount, a new bond may be ordered. The surety on this bond is not insufficient, nor is it insufficient in form or amount, but the statutory requirement of residence is wanting, and to take such a bond is an irregularity. In this case the attorney representing the plaintiff, as well as the plaintiff, are presumed to know the law. To allow a new bond to be given in this case would be to permit plaintiff to take advantage of a known violation of statute. This is not a case of error, mistake or neglect on the part of justice or court in doing or failing to do something the law required of the justice, and for which error, mistake or neglect the plaintiff is in no way responsible. It is a case where the fault lies exclusively with the plaintiff. He procures the signature of a person to the bond as security who under the law can not become surety. The bond is given after case has been tried, in absence of defendant. The justice, it is true, might have required the surety to submit to examination under oath as to his statutory qualification, but was not bound to do so. He might safely rely on the presumption that the surety had the necessary qualifications. In this bond plaintiff misleads the justice by reciting that both principal and surety are residents of Hamilton county, an untrue statement. The defendant can not be deprived of his right to such surety as law requires. The motion to quash will be sustained, and the entry as directed by Section 10394, will show that the appeal is quashed by reason of irregularity in taking as surety on the appeal bond one who at the time was a non-resident of Ohio and had no property liable to execution in Ohio.



1913.]

McCourt v. Akron.

**LEGALITY OF PROCEEDINGS FOR A PUBLIC IMPROVEMENT. 1**

Common Pleas Court of Summit County.

PATRICK T. MCCOURT, A TAX-PAYER, v. CITY OF AKRON ET AL.

Decided, September Term, 1912.

*Municipal Corporations—Legislation by Council for a Public Improvement—Requirements as to Publication of Ordinances—Bids for the Work—Acceptance of Material Manufactured by Only One Concern—Section 4228.*

1. An ordinance reciting that at an election duly held an issue of bonds was authorized for the purpose of meeting the expense of a designated public improvement and appropriating the proceeds from the sale of said bonds for said purpose, is the determining ordinance with reference to such improvement, and where published in accordance with law injunction will not lie to stop the proposed work because of failure to publish a subsequent ordinance which merely ordered the director of public service to enter into a contract with the lowest and best bidder for the carrying forward and completion of said work.
2. Public officials in considering bids for a public improvement are not debarred from determining to use material which is manufactured by only one firm, where such material is not covered by patents, and in the exercise of a reasonable discretion it is accepted, all things considered, as the best offered for the purpose intended.

*Sieber & Sieber and Otis, Beery & Otis, for plaintiff.*

*Jonathan Taylor, Ralph L. Kryder, Scott D. Kenfield and Rogers & Rowley, contra.*

STROUP, J.

This is an action brought by Patrick T. McCourt, as a taxpayer of the city of Akron, against the city of Akron, Robert M. Pillmore, director of public service, James McCausland, city auditor, and Harley J. Motz, city treasurer, and the plaintiff avers in his petition that a certain ordinance, No. 3242, passed by the city council of Akron on the 27th day of May, 1912, was

not published in accordance with the statute, and that for that reason the subsequent action of the director of public service in reference to the letting of a contract for the construction of certain parts of the municipal water works plant was illegal and in violation of law; and secondly, the plaintiff contends that the officers of the city in letting the contract mentioned illegally conducted themselves in such a manner that competition among the bidders was prevented and stifled, and that the lowest and best bid was not accepted, and that there was an abuse of discretion on the part of the executive officers of the city resulting in a fraud upon the city and the tax-payers thereof. Plaintiff prays in his petition that an injunction be granted restraining the executive officers of the city of Akron from going forward with the execution and performance of the said contract, and also restraining the payment of money on said contract.

The successful bidder to whom the contract was let, namely, the Carroll-Porter Boiler & Tank Company, was made a party defendant, and the answer of this defendant and the answer of the other defendants herein take issue with the plaintiff and aver that the proceedings of the council were in conformity with law and that the action of the executive officers of the city was lawful in all respects, and further aver that since the letting of the contract to the successful bidder large quantities of machinery, aggregating many thousands of dollars in value, for the purpose of carrying out the terms of said contract, has been ordered under said contract and that active operations have been commenced upon said work; and the answer of the Carroll-Porter Boiler & Tank Company especially avers that the price of pipe since the letting of the contract has greatly advanced, and if the contract is set aside and held for naught the city of Akron will be obliged to pay a much larger sum for the steel pipe required by it for the work contemplated; that the plaintiff, Patrick T. McCourt, was one of the unsuccessful bidders for said work, and that this action is not instituted and is not prosecuted in good faith by plaintiff; and all the defendants pray that the petition for a perpetual injunction may be refused and for other equitable relief.

1913.]

McCourt v. Akron.

In order to pass intelligently upon the questions presented, it is necessary to briefly review the proceedings had by the council and other officers of the city.

In the first place, the council passed a resolution, under date of April 8, 1912, known as No. 3177, wherein it was declared by the council necessary to issue bonds in the sum of \$1,225,000 for the purpose of extending, enlarging, improving, repairing and securing a more complete enjoyment of the water works of the city of Akron, Ohio, and for the purpose of supplying water to said city and the inhabitants thereof. The resolution, among other things, recites that it is necessary to issue and sell bonds, and that the question of issuing and selling the same be submitted to the vote of the qualified electors of said city at a special election to be held on the 21st day of May, 1912, and that the clerk of the council be directed to transmit a copy of this resolution to the deputy state supervisors of elections.

In pursuance of said resolution a vote of the people was had, which resulted in the requisite number of electors voting in favor of the issuing of said bonds. Thereupon an ordinance, known as No. 3233, was passed on May 27, 1912, wherein, after reciting the fact that an election was held and ordaining that the bonds of said city be issued in the sum of \$1,225,000 for the purposes aforesaid, Section 4 of said ordinance proceeds as follows:

“The proceeds from the sale of said bonds, except the premiums and accrued interest thereon, shall be placed in the treasury to the credit of the municipal water works fund and shall be used for the purpose of extending, enlarging, improving, repairing and securing a more complete enjoyment of the water works of the city of Akron, Ohio, and for the purpose of supplying water to said city and the inhabitants thereof and for no other purpose, and the premiums and accrued interest received from such sale shall be transferred to the trustees of the sinking fund, to be applied by them in the manner provided by law.”

The above-mentioned resolution and ordinance were each properly passed and published in accordance with the statute. On the 27th day of May, 1912, the ordinance in question, No. 3242, was properly passed by the city council, but was not pub-

lished, which ordinance provided that the director of public service be and he is hereby authorized to enter into a contract with the best and lowest bidder, after advertisement according to law, for the construction of the following parts of the municipal water works plant of the city of Akron, and therein follows the particular work contemplated by the contract.

It is contended by the plaintiff that this last-mentioned ordinance should have been published, and for that reason the action of the administrative officers in letting the contract was illegal and void; that this is an ordinance of a general nature and providing for an improvement within the contemplation of the statute, and that it is really the determining ordinance which is a necessary pre-requisite to the further proceedings; that Section 4328 of the General Code provides, in substance, that an expenditure for more than \$500 shall first be authorized and directed by ordinance of council.

The municipal code is somewhat blind as to the necessary steps to be taken when the expenditure exceeds the sum of \$500. In reference to the letting of a contract under the department of public safety, which does not differ materially from the statute under consideration, the Supreme Court, in the case of *City v. Dobson*, 81 O. S., 66, and reading from pages 76-77 has this to say:

“The council provides the money for carrying on the government, either by a levy of taxes, or an issue of bonds, and it is proper that it should have some control over the expenditures, but considering these sections in the light of the purpose of the code we think their requirements are not by an ordinance making an appropriation and stating generally the purpose for which it is made, and authorizing the directors to enter into contracts to effect that purpose.”

It is not possible many times in arriving at the meaning of statutes such as are found in the municipal code to give force and effect to every word and phrase used in the various sections of a series of statutes. We must take into account the general purpose of the statutes, one of which was in this case to constitute

1913.]

McCourt v. Akron.

the council, the legislative body and the director of public service the executive or administrative department of the city, although as to special assessments the Legislature was not wholly consistent in that it is provided that the council should prepare and cause to be prepared plans and specifications, estimates and profiles of the proposed improvement, which duties are clearly administrative in their character. But nevertheless the general purpose of the statute should be observed in construing these various provisions.

It is contended by the defendants in the first place that Ordinance No. 3242 was not necessary, and in the second place, that even if it was necessary there is no provision of law demanding its publication.

The director of public service under the law is the only officer who could prepare the plans and specifications, advertise for bids and enter into the contract, because those duties are plainly administrative duties. After the council had appropriated the money in pursuance of the proper resolution of necessity and the vote of the people, the director of public service was the proper officer to take up the work from thence on and let the contract upon the approval of the board of control.

Section 4 of Ordinance No. 3233 above quoted clearly appropriates the money for the improvement and for no other purpose can it be used. If in this section there had been words authorizing the director of public service to enter into the contract, no question could then be raised. What other than that could the wording of the ordinance mean? It provides that the money shall be placed in the treasury to the credit of the municipal water works fund and be used for the purpose of extending, enlarging, improving, repairing and securing a more complete enjoyment of the water works and for the purpose of supplying water to said city and the inhabitants thereof. Under the statute the money could not be expended, unless the proper advertisement for bids was had and a contract entered into by the director of public service, and why, in the interpretation of this section of the ordinance should we not give it the only construction which under the law could be placed on the same, and in view

of the object to be attained by the passage of the municipal code I think this ordinance may be properly termed the determining ordinance of the council.

But we need not be content with this construction placed upon Ordinance No. 3233. Ordinance No. 3242, wherein it is provided that the director of public service be authorized to enter into the contract in question, was properly passed by the city council, but was not published. It is clear from a reading of the statutes that the department of public service is separate from the legislative department. The object of that portion of Section 3228 of the General Code wherein it recites that the expenditure shall be authorized and directed by ordinance of council, simply means that the council give proper notification to the director of public service that the money is appropriated and that he, the director of public service, is then to proceed with those duties which devolve by statute upon him. If the council went further they would be invading the functions of the administrative duties of the director of public service, and, as is well said by the Supreme Court in the case of *City v. Dobson, supra*, it must have been the meaning of the Legislature that after the appropriation has been made by council and the director is authorized by council, he is to proceed with the work. The sections of the statute pertaining to publication of ordinances do not provide that all ordinances shall be published, but only those of a general nature or providing for an improvement, and that is reasonable, as there is no use of going to the expense of publishing all ordinances unless the public are interested in the publicity of the same.

In this case the preliminary resolution was published, the question of whether bonds should be issued for this particular purpose was submitted to the electors of the city, the source of all power, they gave the requisite sanction for the issuing of the bonds; then followed the ordinance authorizing the issuing of the bonds and the disposal of the proceeds for the particular purpose in question. Now, with what reason can it be urged, even if Ordinance No. 3242 was a necessary step to be taken in the chain of proceedings, that it should be given publicity? It could answer no rightful purpose, for the public had already

1913.]

McCourt v. Akron.

been informed fully as to every step that had been taken up to that point.

I hold that the action of the council in this respect was in conformity with law.

As to the claimed infirmity of the proceedings as to the letting of the contract, the plaintiff claims that the members of the board of control secretly and unlawfully, in advance of receiving bids, determined that they would use what is known in the trade as lock bar steel pipe; that such determination by the board was without knowledge of the various bidders; that the bid of the successful bidder was for rivetted steel pipe, which is a different pipe than a lock bar steel pipe; that after the bids were opened, in pursuance of said unlawful determination, the board switched from rivetted steel pipe to lock bar pipe, without advertisement therefor; that the plaintiff, P. T. McCourt, advised said director of public service that he would furnish lock bar steel pipe and perform the labor in laying the same for much less than was the bid of the successful bidder; that one of the bidders, the T. A. Gillespie Company, was the only bidder for furnishing and laying steel lock bar pipe and that the lock bar pipe is exclusively manufactured and controlled by the said T. A. Gillespie Company, and without reciting further from the petition, the plaintiff claims that such proceedings were had by the officers as stifled competition, all of which resulted in a fraud upon the taxpayers of the city of Akron.

Many of the allegations of the petition fall to the ground when, as the evidence shows, the bid of the successful bidder was not for steel rivetted pipe, but was for "for furnishing and laying 36-inch steel pipe 1/4-inch thick." The advertisement for bids was for steel pipe delivered and laid complete.

Now, it does not matter as to how these bids were tabulated by the engineer in charge of the work; we must determine from the bid itself what it was upon. The evidence shows that "lock bar steel pipe is made by upsetting the edge of the plates and connecting them by a lock bar in the shape of an H going over the opposite edges and being forced down over them by hydraulic pressure. This takes the place of the riveting in the longitu-



dinal joints. The circular joints may be made by riveting or otherwise as for riveted pipe." In riveted steel pipe the longitudinal as well as the circular joints of the pipe are connected by rivets. Both lock bar pipe and riveted steel pipe come within the definition of steel pipe.

It is unnecessary to lengthen this opinion by quoting from the various sections of the specifications. It is the established law that public officers in advertising for bids may call for bids upon various kinds of materials. Section 23 of the specifications in this case provides that lock bar pipe or pipe of other approved type may be used. The director of public service very properly advised the respective bidders as follows:

"In considering the various bids received the director will take into account not only the prices bid on the different types of construction, but also the relative strength, reliability, carrying capacity and durability of the several materials and methods of construction proposed."

The director also stated that he reserved the right to reject any or all bids or accept any bid should he deem it to be for the interest of the city of Akron so to do.

The evidence shows that the board of control, who had the last say as to the acceptance of the contract, accepted the bid of the Carroll-Porter Boiler & Tank Company for the sum of \$379,391, including the work of laying the same, being the price which the company bid for steel pipe and the laying of the same, and providing further that the mill scales be removed from the plates, which, if not included in the specifications, was certainly in the interest of the city. The fact that the T. A. Gillespie Company was the only bidder who specially designated steel lock bar pipe is no reason under the ample plans and specifications why the contract could not be awarded to the successful bidder as long as it bid upon a class of material which comprised the particular kind of material accepted by the board of control. While the petition recites that lock bar pipe is exclusively manufactured and controlled by the said T. A. Gillespie Company, the evidence shows that any patents on the same have expired,



1913.]

McCourt v. Akron.

and certainly it can not be contended that because the material is manufactured by but one firm, the city or any public officer having the matter in charge is thereby precluded from giving the city the benefit of that material, if it should deem it for the best interest of the city.

It is urged that mathematically the bid accepted was not the lowest bid, but in view of our statute which reads that the particular board having this in charge is not bound by the lowest bid, but the lowest and best bid, the awarding officers may take into account not only the price but the ability of the contractor to perform the work and any other considerations which should actuate public officers in the proper discharge of their duties.

The evidence shows that the successful bidder in this case was experienced in this kind of work, and the evidence does not disclose that lock bar pipe when laid is inferior to other kinds. The determining as to which is the best and lowest bid is lodged with the officers of the city, and the court will not interfere with that discretion, unless a gross abuse of the same is manifest.

True in this case the evidence shows that if another bid had been accepted it would have been some thirty odd thousand dollars less than the one which was accepted, but the enterprise which the city is undertaking is one of vast proportions, and the court can not say but that the officers of the city have exercised the best business judgment and are to be comended rather than criticized.

I hold that this claim of the plaintiff is unfounded in law. The prayer of the petition for an injunction is refused and the petition dismissed at the costs of plaintiff.

**PUBLICATION IN ATTACHMENT.**

Common Pleas Court of Hamilton County.

ALFRED R. MILLER v. M. VELDHUYZEN, VAN ZANTEN AND ZONEN.

Decided, October, 1912.

*Attachment—Affidavit for Publication Defective, When—Statutory Provisions Must be Strictly Followed—Section 11292, Relating to Service by Publication.*

1. In an action in attachment the affidavit for publication can not be assisted by the affidavit for attachment or by the petition, but each of the three must be sufficient in itself for the purpose which it fulfills.
2. An affidavit for publication in an attachment proceeding is insufficient if it neither refers to Section 11292 by number, or states that the action is one in which it is sought by a provisional remedy to take or appropriate the property of another, and service obtained under such an affidavit is open to a motion to quash.

*Cobb, Howard & Bailey*, for the motion.

*Charles A. J. Walker*, contra.

DICKSON, J.

The defendant is a non-resident. The plaintiff sues for damages for breach of a contract for goods sold and delivered. At the same time an affidavit in attachment was filed—then an affidavit for service by publication, upon which publication was had.

The court has heretofore found that the affidavit in attachment was fatally defective, hence void, and ordered the property released.

A new affidavit in attachment is filed.

A second publication for service has been had without a new affidavit therefor.

The defendant without entering its appearance, moves to vacate the service by publication because the affidavit for publication became void with the defective affidavit in attachment.

As against non-residents an action may obtain *in rem*, if there be grounds for attachment stated properly in an affidavit, and service may be had by publication by means of a proper affidavit.

1913.]

Tuttle v. King.

The action *in rem* is strictly a statutory provisional remedy and must be strictly followed and strictly construed.

Without the necessary affidavit in attachment there can be no service by publication.

To obtain a judgment *in rem* there must be both the affidavit in attachment and the affidavit for publication. Unless both be valid the action fails.

The motion to quash the service on the ground named in the motion will be granted.

The court is also of the opinion that the affidavit for service by publication is insufficient because it neither refers to Section 11292, General Code, by number, nor does it state the action is one in which it is sought by a provisional remedy to take or appropriate property of another.

The affidavit for publication can not be assisted by the affidavit for attachment or by the petition. In attachment the petition and two affidavits must each be sufficient in itself for its purpose.

The motion to quash the service will also be granted because the affidavit for publication is defective.

#### DISCRETION IN ALLOWING AN APPLICATION FOR A REVIVOR.

Superior Court of Cincinnati.

AURELIUS D. TUTTLE v. JOHN R. KING.

Decided, October 5, 1911.

*Revivor—Delay of More Than One Year in Applying for—Circumstances Warranting a Court in Granting Application—Sections 11402, 11410 and 11411.*

In an action for damages on account of malpractice, which caused the plaintiff much suffering and loss, a court in the exercise of substantial justice will permit a revivor out of time against the executor of the defendant, where objection thereto is based entirely upon the negligence of the plaintiff in delaying his application and the disadvantage under which counsel for the executor labor in being deprived of the aid of the decedent in the preparation and trial of the case.

*Thos. L. Michie and C. C. Kearns*, for plaintiff.  
*Herron, Gatch & James*, contra.

SPIEGEL, J.

Plaintiff filed a petition in tort, against the defendant, who died after service was obtained upon him. A motion to revive the cause was filed within the year after his death, but not prosecuted, whereupon, in the second year, plaintiff filed a supplemental petition asking that the executor of the estate of the deceased be made a party defendant and the action revived in his name. This supplemental petition was filed in accordance with Section 11402 of the General Code, as follows:

“A revivor may be effected by the allowance by the court, or a judge thereof in vacation, of a motion by the representative or successor in interest to become a party to the action, or by supplemental petition alleging the death of the party and naming his representative or successor in interest upon whom service may be made as in the commencement of an action; but the limitation contained in subsequent sections of this chapter do not apply to this section.”

Section 11410 of the Code provides that an order to revive an action against the representative or successor of a defendant shall not be made without the consent of either, unless one year from the time it first could have been made. Section 11411 provides the same in reference to the representative or successor of a deceased plaintiff. Section 11402, therefore, stands alone, but must be construed together with the two sections quoted, in order to give effect to all of them.

In the case of *The Eagle Paper Co. v. Bragg*, 7 N. P. R., page 165, a case reserved from the superior court to the former general term of this court, Judge Hunt writing the opinion, it is held that Section 5149 of the old code (now Section 11402) in order to carry out the intent of the law as embodied in the different sections, is not mandatory, but discretionary with the court. The same was held by Judge Sater, of the U. S. District Court for the Southern District of Ohio, in *Spaeth v. Sells*, 8 O. L. R.,

1913.]

Tuttle v. King.

439. The same rule is laid down by Judge Bates in his work on "Pleading and Practice" (Vol. 1, p. 633).

Adopting this rule, what, then, ought to be the sound discretion of the court in the case at bar? Judicial discretion is defined in 23 Cyc., page 1617, to be "such an exercise of authority in the mode of proceeding for the enforcement of rights or the redress of wrongs as is reasonably designed to promote substantial justice."

The petition alleges that the plaintiff fell from the roof of his residence to the ground, and that the deceased defendant, a physican and surgeon, was called in to afford him medical aid. He treated the plaintiff for a fracture of the right leg, requiring him to lie upon a bed for five weeks, attaching heavy weights to his leg, giving him great physical pain and mental anguish, and depriving him of the opportunity to earn his daily livelihood; then the plaintiff called in another physician, who diagnosed the injury to be a dislocation of the right hip joint from its socket, and replaced said joint in its socket.

The executor of the decedent claims that the cause ought not to be revived because there was negligence on the part of the plaintiff in not prosecuting his motion for a revivor during the year after the death of the defendant; and further, that, because of the death of the defendant, and his continued illness of one year preceding his death, his counsel could not consult with him, and can not, therefore, make use of his testimony.

Weighing both the allegation of the petition and the statement of the defense, endeavoring to promote substantial justice, the court must grant leave to file the supplemental petition against the executor of the defendant's estate, and an entry may be made accordingly.

**SERVICE OF SUMMONS IN DIVORCE CASES.**

Common Pleas Court of Ashland County.

J. L. STOVER v. LULU STOVER.

Decided, 1913.

*Divorce—Lazity in the Matter of Service of Summons—Notice Must Be Given by Publication when the Defendant is a Non-Resident Section 11297.*

The statutory provisions for service of summons in actions for divorce should be strictly construed and followed, which requires that where the defendant is a non-resident of the state notice must be given by publication, and not by personal service.

*Moore & Chorpening*, for plaintiff.

DEVOR, J.

This is an action brought by J. L. Stover for divorce. The plaintiff filed his petition May 23, 1912, and alleged that he has been a *bona fide* resident of the state of Ohio for the year last past. That he was married to defendant at Emlenton, Pa., September 22, 1908, and that there are no children.

Plaintiff says that defendant committed adultery with one Ben. Cox on or about May 15, 1910, and was guilty of improper conduct with one Calvin Bennett at Bridgeport, Ill., January, 1911.

On this petition a summons for divorce, and a copy of the petition was mailed in a registered letter to defendant at Butler, Butler County, Pa., and returned to the clerk of court not delivered.

A summons for divorce with a copy of petition was then issued by the clerk to the sheriff of Ashland County, Ohio, and he appointed Wm. J. Tobay, the sheriff of Butler County, Pa., to serve the same. On May 25, 1912, Wm. J. Tobay made affidavit before an officer authorized to administer oaths in the state of Pennsylvania that he served Lulu Marie Stover by delivering to her a copy of summons and petition on same day at Butler, Butler County, Pa.

1913.]

Stover v. Stover.

This case came on for trial before the court on July 13, 1912. The defendant did not appear, but made default. The plaintiff appeared, and offered his evidence and asked the court for a decree of divorce. The question that confronts the court is one of jurisdiction. Has the service of summons and copy of petition upon the defendant been made according to law?

What kind of service does the law require in a divorce case? The court has found in three of the counties of the sixth common pleas district that it appears to be the notion of some of the lawyers that any kind will do. It seems that some of the attorneys in these cases just take their own opinion without looking at the law, and there being no contest offered at the hearing the court assumes that the attorneys have followed the law in making service of summons and grants a decree of divorce without looking into the question of service, and thus the practice continues. The court has several times found that service was made by publication and affidavit filed that the residence of the defendant was unknown and it appears that the defendant was living in an adjoining county. Not a particle of effort was made to ascertain the defendant's residence before filing the petition. In these instances the parties to the action did not know it was necessary to make any effort to locate the defendant. Their attorneys did not tell them to do so and, of course, they made none.

Section 11984, General Code, provides that notice of the pendency of the action must be given by publication as in other cases if the defendant is not a resident of this state or his residence is unknown. A summons and copy of the petition, forthwith on the filing of it, shall be deposited in the post office, directed to the defendant at his place of residence, *unless it be made to appear to the court, by affidavit or otherwise, that his residence is unknown to the plaintiff, and could not with reasonable diligence be ascertained.* .

This is the statute law governing the service in divorce cases.

Before service can be made by publication in an action for divorce upon a defendant whose residence is unknown, it should be made to appear to the court that the plaintiff has done

something to ascertain the residence of the defendant. Reasonable diligence to ascertain the defendant's residence means that a diligent effort shall be made and then if it appears to the court, by affidavit or otherwise, that his residence is unknown to plaintiff, the court may order service by publication.

In this case the residence of the defendant was known to the plaintiff. There was no affidavit filed with the petition stating the residence of the defendant and giving her address. There was no notice given by publication.

It is claimed by counsel that Section 11297, General Code, and the case of *Holland v. Holland*, 29 Bull., 98, authorizes the kind of service made in this case. This section provides "When service may be made by publication, personal service of a copy of the summons and petition may be made out of the state. Such service shall be proved by affidavit." In the case of *Holland v. Holland* an affidavit for service by publication was first filed. In this case an affidavit was not filed. It is the opinion of the court that the statute for service of summons in actions for divorce should be strictly construed and followed; that where the defendant is not a resident of this state notice must be given by publication, and not by personal service.

Free and easy divorces is an evil, destructive of the home. And as in the case of *Harter v. Harter*, 5 Ohio, 319, "the immoral and mischievous tendency of an easy dissolution of this most solemn of all contracts, we have ever been disposed to give strict construction to the law, and not to hear a case unless the applicant brings him or herself within both the letter and spirit of the statute," so in this. It is the opinion of the court that the defendant has not been properly summoned and the petition will be dismissed at the cost of plaintiff, for this reason.



1913.]

Schaefer v. Tool Co.

**CONSTRUCTION OF THE WORKMEN'S COMPENSATION ACT.**

Superior Court of Cincinnati.

**JOHN E. SCHAEFER V. THE CINCINNATI BICKFORD TOOL COMPANY.**

Decided, January 24, 1913.

*Compensation for Injuries Sustained by Employes—Right of Recovery on the Ground of Negligence Enlarged—Former Defenses Eliminated—Test of Employer's Liability—Section 1465-60.*

1. The Workmen's Compensation Act, General Code, Section 1465-60 (102 O. L., 529, Sec. 21-1), which provides that an employer of five or more workmen, who has not paid the premiums prescribed by said act, shall be liable in damages to any employe for injury caused by "the wrongful act, neglect or default" of such employer, his officers, agents, or other employes, enlarges the basis for recovery on the ground of negligence as it exists at common law, not only by taking away the defenses of the fellow-servant rule, contributory negligence, and assumption of risk, but also by making such employer liable in damages for injuries caused by any wrongful act, neglect or default, gross or slight, which causes such injuries.
2. The test of liability, under General Code, Section 1465-60, is not whether the employer exercised ordinary care but whether he was guilty of *any* wrongful act, neglect or default, which caused the injuries.

*Wallace Burch and E. W. Kemper, for plaintiff.*

*Cohen, Mack & Hurtig, contra.*

PUGH, J.

The plaintiff, John E. Schaefer, on May 28th, 1912, while in the employment of the defendant company as a blacksmith, was injured while engaged in "stoving" a piece of "high speed" steel, and, on August 24th, 1912, brought this suit against said company for damages. The case was tried before this court and a jury, and resulted in a verdict for the defendant. It now comes before the court on motion for a new trial.

The plaintiff alleged that he was directed and required, against his objection, to "stove" a "high speed" steel tool by what

we will call the "hammer and anvil" method, which was unsafe and dangerous, when his employer could have used or caused to be used other methods, which were not dangerous, such as the steam-hammer or the stoving machine, and that while "stoving" the tool as ordered, a fragment of steel flew off from it with great force and velocity and struck his right leg and became imbedded in it at or near the knee joint. He further stated that the work could be done as well or better by using a steam-hammer or stoving machine, without any risk to the workman, and that these were the means of doing such work in common use by manufacturers engaged in the same business as the defendant.

No claim was made that any of the tools furnished him were defective, or out of repair; but he says that the process of "stoving" which he was ordered to use—the "hammer and anvil" method—was dangerous, and that his employer was guilty of a "wrongful act, neglect and default" in compelling him to use it and in failing to provide a steam-hammer or stoving machine as requested.

The defendant is an employer of more than five workmen and has not paid the premiums provided for in the Workmen's Compensation Act, and its liability for injuries to its employes is determined by Section 21-1 of that act (102 O. L., 529), which is now Section 1465-60 of the General Code. The issue for the jury was, therefore, whether the defendant had been guilty of a "wrongful act, neglect or default" in the respect set out in the petition.

(1). The jury was instructed that it was the duty of an employer to exercise ordinary care and prudence, with regard to the safety of his employes, in selecting the method of work which he directs them to use.

(2) Also, that a failure to exercise such ordinary care and prudence is a wrongful act, neglect or default, for which, if injury is caused thereby, he is liable in damages.

(3). Also, that if an employer did exercise such ordinary care and prudence, he is not liable in damages, even though injury did result from using the method of work prescribed by him.

1913.]

Schaefer v. Tool Co.

These instructions were coupled with a definition of what constitutes ordinary care and prudence, and the various applications of these rules of law to the circumstances disclosed in evidence were pointed out. The instructions to the jury were not given in such abstract and general terms as here stated, but the principle underlying them was the one above set forth.

This principle is that of the common law, and as there was no defense of the fellow-servant rule, contributory negligence or assumption of risk, the case was submitted to the jury in practically the same way and under the same rule of law as if the Workmen's Compensation Act had never been passed—or, at least, had no application to the case.

After mature consideration, the court is satisfied that these instructions were erroneous. They were given to the jury in the belief that General Code, Section 1465-60, was not intended to enlarge the common law basis of recovery for negligence, other than by taking away from an employer the defense of the fellow-servant rule, contributory negligence and assumption of risk. The following considerations will show that such belief is not well founded:

The grounds of recovery set out in General Code, Section 1465-60, are "the wrongful act, neglect or default" of the employer. There is no qualification whatever, nothing to indicate that the "neglect or default" which fixes liability must be gross neglect, or slight neglect, or such neglect as is entailed by failure to exercise ordinary care and prudence. The naked words, "neglect or default" employed, import, *prima facie*, all neglects and all defaults.

To limit these terms to such neglect or default as is the equivalent of failure to exercise ordinary care and prudence, as the court did in its instructions, requires a resort to construction; it necessitates reading into the language of the statute some qualification not expressed therein.

Is there any sufficient reason why such an employer should not be held to the plain, unqualified language of the law?

He has been invited to avail himself of the protection against liability of this kind afforded him by the preceding sections of

the Workmen's Compensation Act, and has refused to accept it. If anything, this furnishes a reason why his liability should be extended, not limited, by construction.

The idea of a higher degree of care and prudence in the matters of every-day life, than is exacted at common law from a master towards a servant, is quite familiar. It is the common law rule governing the conduct of common carriers with regard to their passengers. Whether this same rule should or should not govern the relation between master and servant is merely a question of policy. There is nothing startling in the conception, nor would there be any special hardship imposed thereby on the employer which is not imposed as heavily on the common carrier.

It is argued, with some force, that the statutory words "wrongful act, neglect or default," are already known to the law, and have always been understood to import such negligence only as is otherwise expressed as the failure to exercise ordinary care and prudence. But I am unable to agree with counsel on this point. The principal instance used as an illustration seems to me to indicate rather the contrary of what is claimed for it. This is in the phrase found in General Code, Section 10770, which gives a cause of action for death wrongfully or negligently caused. The words are the same as in General Code, Section 1465-60, "wrongful act, neglect or default," and it is argued that these have not been construed to give a cause of action for any negligence unless it amounted to a want of ordinary care. This argument overlooks the phrase which follows the words in question in the death statute (General Code, Section 10770), which makes the whole read "wrongful act, neglect or default, such as would have entitled the party injured to maintain an action and recover damages in respect thereof, if death had not ensued." It appears to me at least equally as reasonable to say that, but for the qualifying words following the expression, "wrongful act, neglect or default" in General Code, Section 10770, recovery might have been had, where death ensued, in cases where the only neglect shown is what is called slight negligence, and where no recovery would have been possible had the injured party lived.

1913.]

Schaefer v. Tool Co.

The imposition on employers, who refuse to accept the protection offered by the preceding sections of the Workmen's Compensation Act, of a liability greater than has ever before existed in this state, seems to have been deliberately intended by the language of General Code, Section 1465-60. It was known, when the act was being considered, that it was exciting much opposition and that vigorous efforts would be made to prevent employers of labor from accepting its provisions. The possibility that the law, when enacted, would become a dead-letter was very great, and it was desirable to adopt every legitimate means of preventing this. While the statute was intended for the benefit of employer and employe alike, it was known that many persons interested in business thought it would work great hardship on the former.

To make the statute effective, it was deemed necessary to insert a coercive clause. In view of the decision in *Ives v. Ry. Co.*, 201 N. Y., 276, it was obviously not expedient to risk the validity of the law by absolutely compelling employers to adopt its provisions, but it was apparent that every means short of this would be necessary. The history of the bill and its progress through the two branches of the General Assembly, and the arguments reported in the case of *State, ex rel, v. Creamer*, 85 Ohio St., 349, wherein the constitutionality of the act was upheld, indicate clearly the necessity of some degree of coercion. Possibly, General Code, Section 1465-60, as herein construed, goes to limits of constitutionality.

The duty of the court is to lend its aid to effectuate the intention of the Legislature. While it is a safe and necessary proceeding, in many cases, to resort to artificial rules in construing a statute and to read into it something not therein expressed in order to arrive at the intention of the Legislature, it is none the less well established law that where the intention is manifest, there is no place for rules of construction.

To the court it seems clear that every means of making the statute effective should be employed, if it can be done without violence to the language used—and the more effective it can be made, with regard to the ends contemplated by the Legislature,

the better. It follows that the greater the liability imposed on employers by General Code, Section 1465-60, the more likely are they to accept these provisions of the act which relieves them from such liability.

The opinion of the court, therefore, is that to relieve an employer from liability under General Code, Section 1465-60, a higher degree of care and prudence than ordinary must be exercised by them. The degree of care required is such that it excludes the existence of any "wrongful act, neglect or default" whatever.

The plaintiff's motion will be granted, and the verdict set aside and a new trial ordered.

---

#### **AS TO COMPETITIVE BIDDING FOR ENGINEERING WORK.**

Common Pleas Court of Hamilton County.

ROBERT S. ALCORN, A TAX-PAYER, V. VICTOR T. PRICE, DIRECTOR  
OF PUBLIC SERVICE, ET AL.

Decided, January 8, 1913.

*Municipal Corporations—Contract with Engineers for Discovering  
Water Waste Need Not be Submitted to Competitive Bidding—  
Certificate of Auditor—Ordinance Authorizing Payment.*

1. A director of public service may employ, without competitive bidding, competent engineers to locate serious water waste, notwithstanding the cost thereof will exceed \$500.
2. Where the funds to be used in paying for such services are not to be derived from taxation, but from the revenue arising from water rents, it is not necessary the auditor first certify that there are sufficient funds in the treasury and unappropriated to meet said obligation.
3. An ordinance, subsequently passed authorizing payment for such services of the sum required in excess of \$500, is a mere granting of authority to pay a valid obligation and is itself valid.

*William Thorndyke, for plaintiff.*

*Alfred Bettman, contra.*

1913.]

Alcorn v. Price.

O'CONNELL, J.

The plaintiff brings suit as a tax-payer to restrain the defendants from paying the sum of \$3,350 to the Pitometer Company of New York, for services rendered in making a certain water waste survey of the city of Cincinnati.

For his cause of action he alleges irregularities in the methods pursued by the city in employing the company and in the mode adopted for payment.

The first objection urged is that the employment was illegal, because the amount involved being in excess of \$500, advertisements should have been required for the work.

Another objection urged is that no certificate was required or obtained from the auditor that funds sufficient for the payment of the bill were in the treasury, unappropriated for any other purpose prior to the attempted employment.

Third, that the ordinance ratifying the employment of the Pitometer Company and authorizing payment, having been presented to council and adopted after the work was done, was illegal and void.

The first objection is not well taken. The water works authorities discovered that there was an excessive use of water from some source. They sought to discover the cause. It might have been due to waste on the part of consumers, or it might have been due to leakage from the water mains in the city streets. If from the latter cause, it was important to discover in what part of the city such leakage occurred.

The Pitometer Company is one engaged exclusively in the investigation of such questions, their employes being engineers trained in such work. It controls devices for use in such work. Owing to the topography of the city, great skill and experience is required in determining these questions, and of necessity only engineers of ability, skill and experience should be employed in such investigations. Manifestly, such work should not be left to competitive bidding.

The result to the city is the opinion of these experts as to the causes of the excessive use of water, whether by leakage or otherwise. The benefit to the city is the remedy supplied and the

recommendations made as the result of the tests made by the investigators and the opinion rendered thereon. The opinion obtained by the city therefore, should be that of some reliable authority and not the opinion of some one who would bid lowest for the privilege of hazarding an opinion.

It has been repeatedly held that where skill, experience and technical knowledge are required for services to be rendered to a municipality, competitive bidding is not required, nor is it the best means of obtaining the best services.

The second objection, to-wit, that the certificate of the auditor was not first obtained that sufficient funds were in the treasury unappropriated for any other purpose, in accordance with the provisions of Section 3806 of the General Code, is not well taken.

The funds to be used in the payment of these services was not derived from taxation. They were to be paid from water works funds arising from the revenues obtained from water rents; in other words, from the earnings of the water works department.

Our Supreme Court has held in a number of decisions, which have been followed, of course, by the lower courts in analogous cases, that such certificate is practically restricted to the expenditure of money arising from taxation, and for purposes which can readily and definitely be ascertained in advance of the annual or semi-annual appropriation of money for the uses of the municipality.

Nor is the third objection well taken.

If competitive bidding were required for the work to be done in discovering the causes of the water waste, and such bids were not solicited or obtained, then the illegal expenditure could not be cured by an ordinance authorizing payment after the work had been contracted for and after the work had been done. But competitive bidding was not and could not be required under the present circumstances. In the first place it was a practical impossibility to prepare and submit to bidders any specifications under which any bidder could submit his proposal.

What guide could the director of public service furnish? What would be the nature of the proposals submitted to bidders? The water works authorities were absolutely in the dark as to the



1913.]

Alcorn v. Price.

causes of the water waste, and themselves wished information and recommendations for remedying the situation.

Were the ordinance one authorizing the payment of money under a contract which was *ultra vires*, or under a contract which was by its terms and conditions illegal, then equity would interfere to restrain any payment thereunder.

Section 4328 of the General Code provides that when an expenditure in excess of \$500 is contemplated by the director of public service, "such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder."

It appearing that the services rendered were such as could not fall within the provisions of this section, equity will not enjoin an expenditure of public funds for failure to comply with its terms and conditions.

The ordinance in question does not seek to validate an invalid act of the director, nor does it attempt to make a contract with any person or company. It merely authorizes the payment of an obligation of the city in excess of \$500. Sums less than that in amount are payable by the director at his discretion.

It is the opinion of the court, therefore, that the injunction prayed for should be refused and judgment entered for the defendant.

**VACATION OF DEFAULT JUDGMENT AFTER TERM.**

Common Pleas Court of Hancock County.

ILLINOIS NATIONAL SUPPLY CO. v. GEORGE W. WHITMAN ET AL.

Decided, January Term, 1911.

*Judgments—Misunderstanding Between Attorney and Client—Resulting in Judgment Being Taken by Default—Held Not to Have Been an "Unavoidable Casualty or Misfortune"—Procedure where Foreign Corporation Has Failed to File a Certificate with the Secretary of State—Sections 11631 and 183.*

1. A misunderstanding between attorney and client, by reason whereof a default judgment was taken against the client, does not constitute such unavoidable casualty and misfortune as authorizes the vacation of the judgment after term.
2. In an action by a foreign corporation it is not necessary that the petition aver compliance with the statutory requirement as to the filing of a certificate with the Secretary of State as a condition precedent to the right to do business within the state. The defense of such non-compliance must be raised by answer, and does not go to the jurisdiction of the court, and is too late after judgment.

*Taber, Longbrake & O'Leary*, for plaintiff.

*John Sheridan*, contra.

DUNCAN, J.

Heard on demurrer to petition to vacate judgment after term.

This is a case on petition to vacate judgment after term. The judgment was for the sum of \$914.35 and was rendered by default at the February term, 1910. The defendant, Tripplehorn, who complains of the judgment, claims he was prevented from defending the suit by "unavoidable misfortune" in that he was served with summons in the action just as he was about to depart for the state of Oklahoma on important business which he could not defer without great loss, and that he left the matter with his attorney, and "as he thinks," with instructions

1913.]

Illinois Supply Co. v. Whitman.

to prepare and file an answer for him, but that through some misunderstanding on the part of his attorney, the same was not done. That ignorant of such matters, he relied upon his attorney and thought the case would come up for trial at the next September term, until August 12, 1910, when he was advised of the judgment. He further says he has a good defense to said action and he tenders an answer setting up a good defense. He also says that this judgment is void for the reason that the plaintiff, an Illinois corporation, at the time said judgment was rendered, had not complied with the laws of Ohio governing foreign corporations and was not authorized to do business or maintain any action in this state.

The case is submitted upon a general demurrer to this petition. Conceding these facts to be true, therefore, is the defendant entitled to have said judgment vacated?

In solving this question, we start out with the proposition that the court has discretionary control of its judgments during the term at which they are rendered, but that this control ends with the term. *Huntington v. Finch*, 3 Ohio St., 445.

In many of the states, this power is discretionary after as well as during the term. In some, by decision of the courts, where there is no statute on the subject. In others, because a discretionary power is given by statute. In Ohio, the power is given and controlled by statute (General Code, 11631). This section so far as it relates to the matter here under discussion, reads as follows:

“The common pleas court, or the circuit court, may vacate or modify its own judgment or order, after the term at which the same was made: \* \* \*

“7. For unavoidable casualty or misfortune, preventing the party from prosecuting or defending.”

In this state after judgment term, as in this case, the court has no discretion in the matter. The power of the court to vacate its judgments after the term is governed by settled principles as applied to the statute, to which the courts must conform and their action thereon is a final order subject to re-

view and reversal, the same as any other order or judgment. *Huntington v. Finch*, *supra*; *Hettrick v. Wilson*, 12 Ohio St., 136; *Braden v. Hoffman*, 46 Ohio St., 639; *Van Ingen v. Berger*, 82 Ohio St., 255, 259. So that, the question here is one of absolute right. *Exposition B. & L. Co. v. Spiegel*, 12 C. C., 761; *Cincinnati v. Railway*, 56 Ohio St., 675; *Interstate Life Assur. Co. v. Raper*, 78 Ohio St., 113.

“Unavoidable misfortune,” is one of the grounds provided by said General Code, 11631, upon which a judgment may be vacated after term, so the question to be determined is whether the facts plead make a case within this provision. In the state of Kansas where this same ground is provided for the vacation of judgments it is held that it must be “so stated as to make it appear that no reasonable or proper diligence or care could have prevented the trial or judgment; that is, that the party complaining is not himself guilty of any laches” (*Hill v. Williams*, 6 Kan., 17). And so it was held by the district court of Cuyahoga county, Ohio, that the complainant must clearly show, first, that he was without negligence himself or by his attorney; second, that he exercised due diligence in making or attempting his defense; and third, that he was prevented by unavoidable casualty. *Fliedner v. Rockefeller*, 12 Bull., 20. Also in *Clark v. Ewing*, 93 Ill., 572. That the negligence of the attorney is negligence of his client is also held in *Gordon v. Cowle*, 1 Clev. L. Rep., 18; *Clark v. Delorac*, 2 Bull., 113. And this seems to be the great weight of authority in the absence of collusion or fraud upon the part of the attorney in permitting judgment to be entered against his client. *Eggleston v. Trust Co.*, 205 Ill., 170; *Moore v. Horner*, 146 Ind., 287; *Hedrich v. Smith*, 137 Ia., 625; *Andres v. Schluter*, 140 Ia., 389; *Welch v. Mastin*, 98 Mo. App., 273; *Butler v. Morse*, 66 N. H., 429; *Phillips v. Collier*, 87 Ga., 66, and other cases.

It is also held that a judgment taken against a defendant by default upon service made at his residence without his knowledge while he was absent from the state can not be set aside for unavoidable casualty though it prevents him from making a defense, the court saying, “there may be casualty or misfortune where all the facts are known, as well as where they are not. I

1913.]

Illinois Supply Co. v. Whitman.

can not but think that this provision was intended to apply, in a case where, some accidental injury or sickness, etc., has intervened to prevent a defense, rather than a want of knowledge of the service of a summons, arising from the cause stated.” *Howard v. Abbey*, 1 W. L. M., 278.

In *Clark v. Delorac*, *supra*, the record showed that the defendant had been in default for answer for six or eight months and that the case, being one for damages, was tried before a jury in December, 1874, resulting in a verdict against him. His petition to vacate the judgment set forth that from November, 1874, to January, 1876, he was confined to his bed by sickness, and was not aware that his case had been tried; that on the same day the verdict was rendered a motion for a new trial was filed by his attorney, on the ground that the damages were excessive, etc. The following Saturday the motion was called and continued, and on the next Saturday, the last day of the term, it was again called, and not being answered by the attorney, judgment was entered on the verdict. On said day, however, the attorney sent a boy to the court house to inquire of the clerk whether motions would be heard that day, and he was informed there would be no court held, and upon that information the attorney made no appearance. Court, however, was held and the motion disposed of as stated. “The only unavoidable casualty or misfortune which the court could discover was the incorrect information received by the attorney through his messenger. There was no casualty or misfortune which prevented the filing of an answer for six or eight months; nor does the petition show any unavoidable casualty or misfortune which prevented the attorney from being present at the trial. So that, the only misfortune was the attorney acting on incorrect information. A judgment is too serious a matter to be set aside for the mere convenience of an attorney.”

In *Clark v. Ewing*, *supra*, the attorney was sick, and had applied for an extension of time, and in his application stated that the pleas in said case were peculiar and nobody could draw them but himself, and he could not explain by letter so that another could draw them. Leave for pleading was extended

till the third Monday of July, at which time no pleas were in, nor was the party, or any one representing him present, and thereupon judgments were taken by default. The attorney had been sick, it appears, and confined to his room for more than four months previous to his death, which occurred two weeks after the judgment. The court on page 577, says:

“Parties litigant and their counsel must be presumed to know the rules of court and it is their duty to comply with them; and if they do not, they must take the consequences. Such rules are instituted for the general good, and it is the duty of the courts to enforce them; otherwise it would be useless to adopt them. If the general health of an attorney breaks down, he should notify his clients of the fact, so they can take such steps as may be necessary for their protection.”

I only state the facts in these cases to show how strict the rule is. The plaintiff has a judgment. To vacate it, is to interfere with a substantial right, and this must not be done without good and sufficient grounds within the meaning of this statute as here discussed. Now, the record shows that the petition in this case was filed November 11, 1909, that personal service was had upon this defendant on the same day and that judgment was not taken against him until March 16, 1910, and that he did not learn of said judgment until August 12. In the meantime it does not appear where he was, that his attorney knew his whereabouts or that he gave or attempted to give his case any attention whatsoever. His “unavoidable misfortune,” as stated, was the misunderstanding on the part of his attorney as to whether he was employed. No doubt this was unfortunate, but was it an unavoidable misfortune? Webster defines “unavoidable” as not avoidable; incapable of being shunned or prevented; inevitable; necessary. Now, assuming as I must, that complainant and his attorney can read, write and speak the English language and are as intelligent as people ordinarily and able to understand, it occurs to me that the complainant must have been so loose and uncertain in his language and conduct in his attempt to employ counsel, or that his attorney was so inattentive and heedless of what was being said to him,

1913.]

Illinois Supply Co. v. Whitman.

or there would have been no misunderstanding. If the result of the effort made to employ counsel in a matter of such importance was that neither knew the mind of the other, the only explanation to be made is that one or both failed to exercise ordinary care in the premises.

In the face of the strictness of the rule already explained, it was the complainant's duty to use unmistakable terms in the employment of counsel and not be sidetracked by any uncertain response to the end that a judgment of more than \$900 would not be rendered against him in three weeks for the want of an answer, and if he did not, he certainly had no reason to complain because a judgment was rendered against him by default after more than four months' notice. If the defendant was not to blame in this behalf, his attorney was, and as we have seen, the negligence of the attorney being the negligence of the client, this furnishes no ground for relief. I therefore hold that the alleged misunderstanding between the attorney and client as to whether the former was retained is not such unavoidable casualty or misfortune as contemplated by said section for which this judgment may be vacated.

The defendant further urges as a ground for the vacation of this judgment that the plaintiff is a foreign corporation and that at the time the judgment was rendered it had not complied with the laws of Ohio governing foreign corporations, and for that reason was not authorized to do business or maintain any actions in this state. The statute which makes the requirements and authorizes a certificate of compliance therewith is General Code, 183, and it will be noticed that only "foreign corporations incorporated for purposes of profit \* \* \* doing business in this state and owning or using a part or all of their capital or plant in this state" are subject to the provisions of this section. Neither the petition to vacate nor the answer tendered describe the plaintiff corporation as one of the kind required to qualify under this statute. This is necessary. To take advantage of this law as a defense to an action brought by a foreign corporation, the averments of the answer must bring such foreign corporation plainly, fully and squarely within its provisions and

show that such foreign corporation does not belong to the class of foreign corporations exempted from its provisions. *Toledo Commercial Co. v. Manufacturing Co.*, 11 C. C., 153; *Automatic Heating Co. v. Schlemmer Co.*, 6 O. L. R., 72.

The statute provides that foreign corporations entirely non-resident may make sales in this state by correspondence or by traveling salesmen, without complying with its provisions. The sales upon which this suit is founded were made by another corporation against which there is no complaint, and the *claim* therefor was assigned by it to the plaintiff company. This is enough, but the question sought to be made here could only operate as a defense in any event. It was waived by failure to answer. It does not affect the jurisdiction of the court. *Brady v. Supply Co.*, 64 Ohio St., 267.

Holding these views, it follows that the demurrer to the petition to vacate must be sustained.

---

#### DETERMINATION AS TO BENEFICIARY.

Common Pleas Court of Hamilton County.

CLARA L. JOHNSON v. POLICEMEN'S BENEVOLENT ASSOCIATION OF  
THE CITY OF CINCINNATI.

Decided, June 22, 1912.

*Beneficial Insurance—Brothers of a Policeman Distinguished as His Beneficiaries—Designation Not Revoked by Subsequent Marriage—And Court Without Authority to Order the Fund Paid to the Widow.*

The designation by an unmarried man of his brothers as beneficiaries of a fund payable at his death by a mutual benefit association is not invalidated or revoked by his subsequent marriage. *Brotherhood of Railway Trainmen v. Taylor*, 9 C.C. (N.S.), 17, distinguished.

*Johnson & Levy*, for plaintiff.

*Jos. W. Conroy*, for Policemen's Benevolent Association.

*Geo. H. Kattenhorn*, for Arthur, John and Charles Johnson.



1913.]

Johnson v. Benevolent Association.

GORMAN, J.

This is an action brought by Clara L. Johnson, the widow of Clifford Johnson, who died December 12, 1911, in the city of Cincinnati, and at the time of his death and for sometime prior thereto was a member in good standing of the Policemen's Benevolent Association of the city of Cincinnati and was also a member of the police force of the city of Cincinnati. The pleadings and the evidence in the case show that Clifford Johnson, while he was a member of the police force of the city of Cincinnati, made application for membership in the defendant association January 17, 1910, and was admitted to membership on that date. At the time he applied for membership he signed and filed with the association a written and printed statement in which he makes the following statement: "In case of death I desire the amount due me paid to my brothers." At that time his brothers were the defendants, Arthur Johnson, John Johnson and Charles Johnson. Clifford Johnson at that time was unmarried. Subsequently he married, and at his death left Clara L. Johnson, his widow, but no children, and died intestate.

The defendant association is organized under the laws of the state of Ohio, under Sections 9427, 9428 and 9429 of the General Code, formerly Section 3630, Revised Statutes, which among other things provide that:

"A company or association may be organized to transact the business of life or accident insurance on the assessment plan for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of the deceased members of such company or association."

This act was passed May 14, 1886. The defendant association was incorporated under this statute September 10, 1888. Among other things its constitution and by-laws provide that its object "shall be to provide assistance for the families or legal heirs of a deceased member." By Article IV, Section 1, of its constitution, it is provided that:

"Each member of this association shall be assessed the sum of two (2) dollars, to be paid within thirty (30) days after the death of a member, upon due notification."

Section 2 of the same article reads as follows:

“The sum so paid shall be held as a death benefit fund, to be paid to the family or whoever the next deceased member may have elected, immediately, upon satisfactory evidence of such death having been furnished to the board of trustees.”

These are the only sections of the constitution which bear upon the case under consideration.

The petition in this case was filed January 29, 1912, by the plaintiff, Clara L. Johnson, the widow of Clifford Johnson, wherein she alleges that he died December 12, 1911, at which time he was a member in good standing of the defendant association; that she is his widow dependent upon him for support and is his sole heir at law and the sole member of his family. She asks for a judgment against the defendant association for \$1,500.

The defendant association under the statute has interpleaded in the case by filing an affidavit in which it sets up that it has in its hands \$1,328, which represents the amount due on the life of Clifford Johnson, deceased; that said decedent, Clifford Johnson, named his brothers as beneficiaries to whom the fund should be paid at his death by the defendant association; that said fund represents the amount raised by assessment on the members; that without collusion with the defendant association, the plaintiff, Clara Johnson, and the brothers of Clifford Johnson, deceased, to-wit, John, Charles and Arthur Johnson, make claim to the fund; that the defendant association is ignorant of the rights of the respective claimants, and does not know to whom it can safely be paid; that it is ready and willing to pay the money as the court may direct and hereby offers so to do and asks that the respective parties may interplead between themselves and that the court determine to whom said fund should be paid.

The brothers by answer and cross-petition claim the fund by virtue of having been designated as the beneficiaries by Clifford Johnson, deceased, at the time he became a member of the defendant association, and aver that no change was made in the

1913.]

Johnson v. Benevolent Association.

designation and that they are the brothers of Clifford Johnson, deceased, members of his family, and entitled to said fund.

The court made an order of interpleader in the case, and the cause was submitted to the court without the intervention of a jury, both parties having waived a jury, and the evidence was heard and submitted with the case. There is practically no dispute as to the facts in the case, that Clifford Johnson at the time he became a member of this defendant association was unmarried and that his three brothers above named were his next of kin. Sometime after he became a member of the defendant association, he married the plaintiff and died as stated, leaving her as his widow, intestate and without children. There was the testimony of Mary Schnittger, at whose house the deceased lived during his last illness, that she had requested Clifford Johnson to change the designation of the beneficiary in the defendant association, and asked him if he did not desire to substitute his wife's name for his brothers as the beneficiary, but he answered that he did not desire to do so, but desired the fund to be paid to his brothers unless there was a child born to his wife.

The question to be determined by the court in this case is, to whom shall this fund be paid—to the plaintiff, the widow of Clifford Johnson, deceased, or to the brothers who were designated in writing as the beneficiaries? Both by the law of the state and the constitution of the defendant association, the fund raised by assessment was to be held as a death benefit fund, to be paid to the family or the legal heirs of the deceased, or to whoever the deceased member may have elected, which I take it means have designated.

It has been held by numerous authorities that the right of the beneficiaries in the funds is not a vested right during the lifetime of the member of a benefit society. The rule of these societies is just the opposite to that relating to life insurance, where it is generally held that the beneficiary has a vested interest from the date of the issuing of the policy. But the rule applicable to benefit societies is that the beneficiary has a mere expectancy during the life of the member, and that the right of the member is the power of designation if that right is given to

him; otherwise the fund is to be paid to the persons specified in the law of the society and the law of the state under which the society is organized.

The contract between the society and a member is with the member; he alone is interested in it, and the beneficiary has no rights which can not be lost by the act of the member, and none that can be asserted while the member is living. The member of the society, as such has, under this contract, no interest or property in this benefit, but simply the power to appoint some one to receive it. Sections 236-237, V. 1, Bacon on Benefit Societies.

Now the constitution of the defendant association empowered Clifford Johnson to designate some one as the beneficiary, and this provision of the constitution of the society is not in conflict or inconsistent with the law of the state under which the society was organized (see sections of General Code above cited). At the time Clifford Johnson designated his brothers as the beneficiaries, they came within the class of persons who might be designated as beneficiaries. They were members of his family and they were also the persons who would have been his heirs at law had he died unmarried. They were, therefore, proper persons who could lawfully be designated as beneficiaries of this fund. By the marriage of Clifford Johnson subsequently to this designation, these brothers ceased to be members of his family in the strict sense of the word, at least they were not members of his immediate family. His wife and himself were living together and his immediate family consisted of his wife alone. She is also his sole heir at law, so far as any personal property is concerned under the laws of the state of Ohio, and the brothers who would have been his heirs had he died unmarried, are not now his heirs because of this marriage.

The question therefore is, did the marriage of Clifford Johnson have the effect to revoke the designation of his brothers as beneficiaries? If Clifford Johnson had made no designation at the time he became a member of the defendant association, there is no doubt that the fund would be payable to his widow, the plaintiff. If he had substituted his wife as the beneficiary in place of his brothers, designated by him as beneficiaries, then

1913.]

Johnson v. Benevolent Association.

there could be no question as to the right of his widow to this fund. But having designated his brothers at a time when it was proper to do so and when they came within the two classes provided for—his family and his heirs—and never having changed the designation, it seems to the court that the sole question to be determined is, did the marriage of Clifford Johnson in law operate to revoke the designation of his brothers as beneficiaries?

There appears to be a great conflict of authorities upon this question. Counsel for the plaintiff and for the brothers have cited numerous authorities in support of their respective contentions. It is contended by counsel for the plaintiff that the rights of the parties to this fund are not to be determined as of the date of the death of Clifford Johnson, but rather as of the date when the fund is payable. There was no certificate issued in this case, nor does the defendant association issue certificates, but the court is of the opinion that this fact is not material. The certificate would simply be the evidence of the rights of the members and of those who would be entitled to the fund.

It was held by the General Term of the Superior Court of Cincinnati in the case of *The Young Mens Mutual Life Association v. Harrison*, 23 Bul., 360, that a member of an association organized under Section 3630, Revised Statutes (the law under which the defendant association was organized), for the purpose of mutual protection and relief of its members and for the payment of stipulated sums of money to the family or heirs of deceased members, may designate his mother as the beneficiary—a case similar to the one at bar—and under this decision we see no reason why Clifford Johnson could not designate his brothers.

It is contended by counsel for the brothers that the contract is between the deceased, Clifford Johnson, and the defendant association, and that he and he alone had the right to designate or to change the designation and to substitute any person he desired as the beneficiary, provided the designation was within the class of persons who could participate in the distribution of the fund.

It was held in the case of *Catholic Order of Foresters v. Calahan*, 146 Mass., 391, that where an unmarried member of an

organization, such as the one in the case at bar, had designated his mother as the beneficiary, that she was a proper person and came within the class, and that the member's subsequent marriage—living with his wife apart from his mother—did not operate to revoke the designation of his mother, and that the mother was entitled to the fund as against the widow. In that case the law authorized the society to raise a fund “for the purpose of assisting the widows, orphans, or other persons dependent upon deceased members, or other relatives of the deceased members.”

The court says on page 394:

“The deceased member had a right to designate as the beneficiary of the fund any person coming within the statutory provisions which enumerate those who may be thus designated. \* \* \* The designation of his mother by the deceased was therefore one to which the association had a right to assent, as it did assent, by accepting the order of the deceased.” Citing several authorities. “This (designation) was not revoked by the subsequent marriage of John J. Callahan, and his mother, Catherine Callahan, is now entitled to receive the fund of \$1,000.”

Counsel for the plaintiff cite the case of *Knights of Columbus v. Rowe*, 70 Conn., 545, which holds just the contrary to the case last cited 146 Mass., on apparently the same state of facts, the one difference being that the father was designated as the beneficiary instead of the mother, and the member subsequently married and died leaving a widow. This case arose under the laws of Connecticut providing for the organization of the society of which Rowe was a member, but the law provided that the fund should be paid to such persons of the member's *immediate family* as the member should designate, and in default of an immediate family, then to such relative of the member as he should designate, and in default of any designation by the member, then to be paid to such family or relative who are heirs at law of the member. The court in this case construed the law to mean that the widow, being the *immediate family*, was first entitled to the fund in preference to the father.

We think this case under the law of Connecticut can be distinguished from the case at bar because the statute under which

1913.]

Johnson v. Benevolent Association.

the defendant association was incorporated does not point out to whom the fund shall be paid other than to the family or legal heirs.

The case of *Larkin v. Knights of Columbus*, 188 Mass., 22, followed the case in 70 Conn., *supra*, but this decision was based upon the law of Connecticut, and the Supreme Court of Massachusetts in deciding the case said that they felt that they were concluded by the decision in 70 Conn. The Supreme Court of Massachusetts has not reversed the case in 146 Mass., but on the contrary has approved that case in *Clark v. Royal Arcanum*, 176 Mass., 468, at page 471, where the court says:

“Nor does the subsequent marriage of the wife to the member revoke or in any way affect the contract which he had made with the society.” Citing *Catholic Order of Foresters v. Callahan*, 146 Mass., 391.

There are many cases which hold that if the designation was a proper one at the time it was made, the person or persons so designated would be entitled to the fund at the death of the member, if there has been no change in the designation, even though the status of the beneficiary and the member change subsequently to the designation.

In *Sheehan v. Journeymen's B. P. Association*, 142 Cal., 489, a member had designated his mother as the beneficiary, and subsequently married. It was held in the case where the widow claimed the fund as against the mother, that the subsequent marriage of the member did not operate to revoke the designation, and that the mother was entitled to the fund.

In *Overhiser v. Overhiser*, 14 Col. App., 1, the member was married and designated his wife as the beneficiary. Thereafter the wife obtained an absolute divorce and after the divorce, upon the death of the husband, it was held that she was entitled to the fund.

In *Stake v. Stake*, 228 Ill., 630, the member designated his brother as the beneficiary and subsequently married. *Held*: that the subsequent marriage did not revoke the designation of the brother as the beneficiary and as against the widow after



the death of the member. It was held that the brother was entitled to the fund.

To the same effect is the case of *Highland v. Highland*, 109 Ill., 366.

In *White v. Brotherhood of American Yeomen*, 124 Ia., 293, a member designated his wife as the beneficiary. Thereafter the wife obtained an absolute divorce and on the death of the member, although she was not then his wife, it was held that she was entitled to the fund, he having failed to substitute another beneficiary.

In *Courtois v. Grand Lodge A. O. U. W.*, 135 Cal., 522, a member designated his wife as the beneficiary, subsequently was divorced, and upon his death the divorced wife was awarded the fund.

In *Schmidt v. Hauer*, 111 N. W. (Ia.), 966, a member designated his wife as the beneficiary, thereafter was divorced from her and having died a member in good standing, it was held that the divorced wife was entitled to the fund.

In *Benton v. Brotherhood of R. R. Brakemen*, 146 Ill., 570, a member designated his mother as the beneficiary, who was not dependent upon him. He subsequently married, and it was held in a contest between the mother and the widow over the fund, that the mother was entitled to the fund and that the marriage of the member after the designation did not operate to revoke the designation. This is a very strong case following the case in 146 Mass., 391.

In *Brown v. Order A. U. W.*, 208 Pa. St., 101, a member designated his wife as the beneficiary, subsequently was divorced absolutely from her, and after his death it was held that the divorced wife was entitled to the fund.

Counsel for the plaintiff have cited several authorities which he claims support the rule laid down in 70 Conn., 545. We shall note these cases briefly.

In the case *Caudell v. Woodward*, 96 Ky., 646 (29 S. W., 614), the beneficiary designated was not a member of the family nor an heir—merely a friend—and it was very properly held that such a designation was void because she did not come within the



1913.]

Johnson v. Benevolent Association.

class of persons whom the law of the state and the law of the order provided for.

In *Wagner v. St. Francis Xavier Benefit Society*, 70 Mo. App., 161, the member attempted by will to divert the funds from the persons to whom it was payable under the law and by the rules of the society. It was very properly held that this could not be done.

*Groth v. Central*, 95 Wisc., 140, is a case not in point because the certificate in that case was issued to one who did not come within the class of persons provided for either under the laws of the state or under the law of the order and the certificate was held to be void as to the beneficiary named.

*Love v. Clune*, 24 Colo., 237, is a case in which the member designated one who was not in the class of persons to be provided for.

The case of *American Legion of Honor v. Smith*, 45 N. J. Eq., 466, is not in point because the fund was awarded to the wife, although she had been divorced but not absolutely.

I have heretofore referred to *Larkin v. Knights of Columbus*, 188 Mass., 22, in which case the Supreme Court of Massachusetts in passing upon the case of an association organized under the laws of Connecticut, followed the case in 70 Conn.

The case of *Grand Lodge v. Iseet*, 37 S. W., 377, is one in which the member undertook to designate as a beneficiary one who was not within the class of persons to be provided for.

*Britton v. Supreme Council*, 18 Atlantic, 675, is another case in which the member undertook to designate as a beneficiary a person who was not within a class of persons provided for by the law of the order or of the state.

The case of *Journeyman's Butcher Assn. v. Bristol*, 120 Pacific, 787, is another case in which the member undertook to designate as the beneficiary a person who was not within the class of persons to be benefitted by the law of the state or of the order.

The court has not the space to go over all the cases cited by counsel on both sides. The one case in this state which the court believes has a tendency to support the claim of the plaintiff, is that of *Brotherhood of R. R. Trainmen v. Taylor*, 9 C.C.

(N.S.), 17. In this case the Circuit Court of Ross County held that a divorced wife of a member who had been designated as the beneficiary in a certificate issued by a society organized under Section 3631-11, Revised Statutes, was not entitled to the fund upon the death of the member in good standing, because it was held that the status of the beneficiary at the time of the payment had changed and that she was not then his wife.

In this case the court uses the following language on page 20:

“The main question here is whether or not this certificate shall be construed according to its terms at the date of issue or whether we shall construe this policy, and change in effect its character and meaning, by construing it as of the date of payment of the benefits. For if it be construed as of the date of issue, Alice B. Taylor was then his wife and under the contract terms of the certificate should be paid. And if it should be construed to take effect at the date of payment and to take effect only to one of the persons named in this section of the statute, then it is very evident that Alice B. Taylor can not take, although the certificate in express terms provides that she may, and therein lies, we think, the great or seeming conflict of authority of the various cases that have been cited to us upon both sides of this question. It is our opinion that when the statutes of Ohio provided that payment of death benefits shall be to one of the class named, that this certificate should be construed as of the time of payment and payable only at that time to one of the classes named in the statute, if there be any such.”

I agree with the learned court which decided this case that there is a seeming great conflict of authority upon this question; in fact the conflict is so great that it is utterly impossible to reconcile the authorities. But it seems to me that this designation by Clifford Johnson was made at a time when it was perfectly valid to designate his brothers, and that at that time they came within both the classes of persons who might be named as beneficiaries, to-wit: members of his family and his heirs. It is true that no one has heirs until his death, but the brothers stood in the relation of his next of kin and would have been his heirs had he died unmarried. They were also members of his family, whatever family he then had. He himself did not see fit to change the designation which he had made when he became a

1913.]

Johnson v. Benevolent Association.

member of this society, and I am of the opinion that upon the weight of authority, it is not within the province of the court or any person, other than the member, to change the name of the beneficiary. The designation of the brothers as beneficiaries was not void, but a perfectly valid designation at the time it was made and as we have seen from the cases cited, the weight of authority is to the effect that a subsequent marriage does not have the legal effect of revoking the designation made by a member, which designation was legal and valid when made.

I have endeavored to solve this problem as best I can in view of the conflicting authorities, and I may say that the sympathies and inclinations of the court are with the widow rather than with the brothers; but aside from the case cited in the 9th C. C. (N.S.), I am unable to find any authority to warrant a conclusion that there has been a revocation of the designation made by Clifford Johnson of the beneficiaries to whom this fund was to be paid. I am of the opinion that the case in 9 C.C.(N.S.) is to be distinguished from the case at bar, because the statute under consideration in that case prescribes the order in which payments were to be made, and further because in the designation made by the member in that case, he provided that the money was to be paid to Alice B. Taylor, his wife, if living, and if not living, to be paid to the administratrix of his estate in trust for the heirs of the member, and the court by a fiction of law in that case, held that while Alice B. Taylor was living, the *wife* by a decree of divorce had ceased to live. She was no longer the wife; the words Alice B. Taylor were merely *descriptio personae*.

The judgment of the court is that the fund in this case be paid to the brothers of Clifford Johnson.

**ACTION BY STOCKHOLDER FOR INSPECTION OF BOOKS.**

Superior Court of Cincinnati.

ADA OLDHAM PEARCE V. HARRY T. ATKINS ET AL.

Decided, January 2, 1913.

*Corporations—Injunction Restraining Refusal to Permit Stockholder to Examine Books and Records—Statutory Right Extends to Preferred Stockholders—Parties—Section 8673.*

1. Where an action is brought against a corporation, and its president is also made defendant therein, as president and individually, and a cause of action is stated in the petition against the corporation but not against the other defendant, the latter will be dismissed from the case, on demurrer.
2. General Code, Section 8673, which prescribes that the books and records of a corporation for profit shall be open for inspection by holders of stock, at all reasonable times, applies to holders of preferred as well as to holders of common stock.

PUGH, J.

The petition shows that the defendant, the Atkins-Pearce Manufacturing Company, is a corporation for profit organized under the laws of the state of Ohio, with an authorized capital stock of \$60,000, of which \$20,000 is common stock and \$40,000 is preferred stock. It further sets out that the plaintiff is the owner of all the preferred stock and that she has demanded and has been refused an inspection of the property, books and records of the corporation, and prays an injunction against the defendants "from refusing to allow her to make an inspection" and for an order of court requiring the defendants to permit the same.

(1) The defendants named are Harry T. Atkins individually, and as president of the Atkins-Pearce Manufacturing Company, and the company itself. The only allegation contained in the petition which mentions the defendant, Harry T. Atkins, is the following:

"That the defendant, Harry T. Atkins, is the president of the said the Atkins-Pearce Manufacturing Company."

1913.]

Pearce v. Atkins et al.

He is not said to have done anything, or to have been asked to do anything, or to have omitted or refused to do anything, or to have any connection with any of the matters set out in the petition. Obviously, the mere fact that he is the president of the defendant company is no ground for issuing an injunction against him. Nor in the absence of any allegations showing reasons therefor is there ground for issuing an order requiring him to permit an inspection of the company's property, books and records.

The demurrer will therefore be sustained as to Harry T. Atkins individually and as president of the Atkins-Pearce Manufacturing Company, and he will be dismissed from the case.

(2) Section 8673, General Code, provides:

“The books and record of such corporation at all reasonable times shall be open to inspection of every stockholder.”

The corporations referred to in said section are corporations for profit.

It is now contended that although the statute says: “every stockholder” shall have the right to inspect the books and records, it does not mean every stockholder, but only such as are holders of the common stock as distinguished from those who are holders of the preferred stock.

One is naturally inclined to ask why the General Assembly accorded this right in such express terms to every stockholder, if it meant to exclude therefrom the stockholders who own preferred stock. An examination of the preceding and succeeding sections of the General Code relating to stockholders affords no suggestion that any such distinction was intended.

Neither is there anything in the nature of the interest owned by a stockholder of preferred stock that should exclude him from such right.

The capital stock of the Atkins-Pearce Manufacturing Company consists of common stock to the amount of \$20,000 and preferred stock to the amount of \$40,000, and the plaintiff owns the entire preferred stock. In other words, she has invested in this business twice as much money as all the other stockholders put together. It is true she has no vote or voice in the control

of the ordinary business of the company, but that is not to say that she has no interest therein. She is something more than a creditor or bondholder of the concern, as claimed. She is more like a silent partner. In certain contingencies which are not infrequent in the history of corporations for profit she would have certain equitable rights which no creditor could possibly claim.

The petition prays an inspection of the property, books and records of the defendant company. Whether the plaintiff has the right to inspect the property of the company it is not necessary at the present time to decide. No statute gives her that right, but the right to inspect the books and records and the refusal of the defendant company to accord her this right states a sufficient cause of action to be proof against a general demurrer.

For these reasons the demurrer of the Atkins-Pearce Manufacturing Company is overruled.

---

### LOCAL OPTION IN RESIDENCE DISTRICTS.

Common Pleas Court of Hamilton County.

IN RE PETITION OF A. P. LOUNSBERRY AND OTHERS FOR THE  
PROHIBITION OF THE SALE OF INTOXICATING LIQUORS  
IN THE VICINITY OF NORWOOD.

Decided, September, 1911.

*Petition to Prohibit Liquor Traffic in Residence District—Description of Proposed District and Map thereof Insufficient, When—Section 6140.*

Where neither the petition for the prohibition of the sale of intoxicating liquor in a residence district, nor the map attached thereto, or the map and petition taken together, give the number or location of the saloons in the proposed territory, the requirement of the statute that the number and location of the saloons be shown has not been complied with, and the petition or the map and petition taken together are insufficient and must be dismissed.

HUNT, J.

A petition having been filed with me, under the Jones law (98 O. L., 68), Section 6140, General Code, by certain residents

1913.]

Petition under Jones Law.

of a resident district constituting a part of the city of Norwood, for the prohibition of the sale of intoxicating liquors as a beverage in said district, and due notice thereof having been given, other residents of said district by their counsel appear to contest the granting of the order prayed for.

The principal grounds alleged by the contestants objecting to the petition are:

First. The insufficiency of the description of the district in the petition itself.

Second. The insufficiency of the map or drawing of such district attached to said petition.

Under the law not only must the district in which the sale is to be prohibited be described, but Section 4a of the law as amended March 31st, 1908, Section 6146, General Code, provides:

“All petitions for signature \* \* \* shall have a map or drawing attached showing the outlines of the district and location of all saloons within the district proposed,” etc.

Undoubtly the Jones law should be so construed that the operation of the remedy therein provided, for the legislatively admitted evil, shall not be unreasonably obstructed by mere technicality. Nevertheless, there being no ambiguity in the law a reasonable compliance with all its requirements by the petitioners must be had before the petition can be granted.

While the description of the proposed district as given in the petition is in some parts ambiguous, yet from the whole description, taken together with the map attached thereto, and which by law is made a part of the proceeding, such ambiguities are not necessarily fatal defects.

That the map or drawing of the proposed district is essentially a part of the application is admitted. Section 4a of the Jones law (Section 6146, General Code), requires such map or drawing to show the outlines of the proposed district.

The map attached to the petition in this proceeding is a part of a printed map of Norwood and vicinity, and the particular part attached to the petition herein is not confined to the proposed district, but takes in adjoining territory with no lines or marks there indicating the *outlines* of the proposed district, ex-

cept that if the outlines or boundaries of the district as given in the petition be applied to such map, an outline of the district can be perceived, and the surplusage of the map thereby eliminated. Such a map, as that attached to the petition herein, could undoubtedly cause much misunderstanding if not uncertainty as to the boundaries of the proposed district in the mind of average persons to whom such map and petition are presented for signature, and would defeat one of the purposes of the amendment requiring that the outlines of the district be shown on the map; but would not deceive any person who would take the necessary time and care to apply the description to the map.

However, Section 4a of the law (Section 6146, General Code), further provides that such map or drawing shall show the location of all the saloons within the proposed district.

There is nothing in the petition in any way that refers to saloons or other places where liquor is sold, or their number or location. On the printed map attached to the petition there are four cross-marks, carelessly made so that such crosses show no exact location with any degree of certainty, except a general location in the proposed district. There is nothing on the map or in the petition stating what the red cross-marks are intended to indicate. It is claimed that such red marks were intended to indicate four saloons, but except as such information was given to the court by the counsel for the petitioner at the time of the hearing, the court would not be advised of such intention, unless as a mere surmise; nor a person to whom the map was shown know that saloons were located about where such marks were made.

The number and location of the saloons in the supposed district is a fact of which this court can not take judicial notice, even if the court had knowledge of the fact. Therefore, as neither the map attached to the petition, nor the petition, nor both the petition and the map taken together, give the location and number of the saloons in the proposed territory, the requirement of the statute, that the location and number of the saloons be shown, has not been simply inadequately or ambiguously complied with, but wholly uncomplied with.

The map, or the petition and the map taken together, must therefore be held to be insufficient.



1913.]

Severs v. Commissioners et al.

**APPEAL OF DITCH PROCEEDINGS.**

Common Pleas Court of Fayette County.

MARY A. SEVER V. COMMISSIONERS OF FAYETTE COUNTY ET AL.\*

Decided, June 8, 1905.

*Ditches and Drains—Appeal from County Commissioners to Probate Court—What Constitutes a Final Order—Burden of Proof—Misapprehension by Jury—Verdict Against the Weight of the Evidence—Sections 6469 and 6471.*

1. In a ditch proceeding before a board of county commissioners, the final order from which an appeal may be taken to the probate court is the determination reached at the final hearing.
2. The provision of Section 6471 that the appellants shall be plaintiffs on appeal from an order declaring for a ditch improvement, does not make it incumbent upon the appellants to assume the burden of proof; and where the appeal is from an order declaring for a ditch improvement, the burden is on the commissioners and petitioners affirming that the ditch will be conducive to the public health, and not on the appellants denying that such would be the fact.
3. Where a proposed township ditch is substantially identical with an existing township ditch, except as to certain laterals as to which there is no evidence that they will be conducive to the public health, convenience or welfare, a verdict by a jury who misapprehending the instruction not to find for the improvement if the existing ditch would afford sufficient drainage, found in favor of the proposed improvement, will be regarded as against the evidence, notwithstanding the court did not have on review all the evidence before it, the view which the jury had of the proposed improvement being lacking therefrom.

*H. H. Sanderson, for plaintiff.*

*Post & Reid, E. L. Bush, Creamer & Creamer, contra.*

DRESBACH, J.

Error to Fayette Probate Court.

This cause is presented to this court upon a petition in error from the trial of said cause on appeal in the probate court.

---

\* Affirmed, *Sollars v. Sever et al*, 8 C.C.(N.S.), 364.

ing” are to be construed as meaning any “hearing” at which any “final order” is made, then, as a number of “final orders” may be made in the course of this proceeding, we would have more than one “final hearing before them.” Such a construction does palpable violence to the plain and direct language used in this statute. The word “final” qualifying “order or judgment” in General Code, 6469, is here used in the sense of “conclusive, decisive and final judgment,” while the word “final” qualifying “hearing before them” is used in the sense of “pertaining to the end or conclusion; last; terminating” (see Webster). The language used in General Code, 6469, providing for this appeal, is in my judgment, too clear to need further comment. The point is not well taken; the several motions to dismiss are overruled. I do not find anything else of sufficient importance in the motions to justify taking space to comment upon it in this written memorandum of my reasons for the conclusions which I have reached in this case.

This brings me to a consideration of the errors complained of by the plaintiff in error.

The court below in its general charge to the jury said:

“The burden of proof is on the appellants, and they must show by the preponderance of evidence, that the proposed improvement will not be conducive to the public health, convenience or welfare, of the community through which the proposed improvement passes.”

The court also refused to give the following charge requested by plaintiffs in error:

“Before the jury can render a verdict for the defendant, it must find by a preponderance of the evidence, that there exists the necessity, in order to promote the public health, convenience or welfare, for the construction of the proposed ditch and that its construction will be conducive to the public health, convenience and welfare of the public generally in the neighborhood through which the proposed improvement will pass.”

To the charge as given, and to the refusal to give the above charge requested, exceptions were duly taken by the plaintiffs in error.

1913.]

Severs v. Commissioners et al.

It appears further, from the record, that "Before the statement of said cause and before any evidence was introduced, said Mary A. Sever on behalf of herself and co-appellants, William Ging and C. & M. V. R. R., demanded of the court that it order and direct defendants to assume the burden of proof, and to open and close said case, and that she and her said co-appellants be relieved from assuming the burden of proof and opening and closing said cause, but the court refused to make such order, but on the contrary, held and ordered that said Mary A. Sever and her said co-appellants had, and must assume the burden of proof, and open and close said cause, to which the said Mary A. Sever at the time excepted."

Did the court err in these particulars?

What was the issue? Under General Code, 6469, and this appeal, one issue was: "Whether said ditch will be conducive to the public health, convenience, or welfare."

To properly determine this branch of the case it was necessary that this inquiry as to this ultimate fact be answered, yes, or no.

Who necessarily affirmed it? Certainly the petitioners for the improvement and the county commissioners; and these plaintiffs in error denied it.

Greenleaf in speaking of the "Burden of proof, upon which party it lies," says:

"A third rule which governs in the production of evidence is, that the obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue." 1 *Greenleaf, Evidence*, Section 74.

In view of the claim of the defendant in error that as the jury are entitled to take what they saw on their view as evidence, that strictly speaking neither party has the burden of proof, the following language of the Supreme Court of Massachusetts in *Central Bridge v. Butler*, 68 Mass. (2 Gray), 130, 132, seems pertinent:

"The burden of proof and the weight of evidence are two different things. The former remains on the party affirming a fact in support of this case, and does not change in any aspect of the cause; the latter shifts from side to side in the progress

of a trial, according to the nature and strength of the proofs offered in support or denial of the main fact to be established." Quoted in note to Section 74 of 1 Greenleaf, Evidence, with many other authorities.

It is settled in this state that what the jury observe on such view is evidence (*Williams v. Lockoman*, 46 Ohio St., 416; *Lake Erie & W. Ry. v. Commissioners of Hancock County*, 63 Ohio St., 23); therefore, when the jury go out and make the view they have then received part of the evidence. It is the proper and logical thing to do to take part of the evidence and then stop and say, "here at this point we determine the burden of proof. If no more evidence is introduced we can not say which party would fail, therefore, the burden of proof is not upon either party." Clearly such a method would lead to absurd consequences.

The burden of proof must be determined from the issues. The test is to be applied before any evidence is introduced, and the mandatory provision for this view, and then the statement that either party may offer evidence, is not, in my judgment, a sufficient indication of legislative intention to establish an arbitrary rule, which seems to do such violence to justice and reason and the accepted rules of practice.

But, it is also contended by defendants in error, that the matter has been settled by statute, and the provisions of General Code, 6471, that "the appellant shall be plaintiff therein and the county commissioners and petitioners defendants," is cited in support of such claim. In my judgment this simply provides a style, or name, for the case. We know that when error is prosecuted the style of the case is reversed. It was convenient to have some style, or order of name, and that provided seems quite a natural one. Surely the courts are not warranted in construing this simple provision to indicate a legislative intention that the citizen whose property is sought be taken under the power of eminent domain for a public use, shall be compelled to assume the burden of proving the non-existence of the facts which are depended upon to justify and authorize the taking of his property. Not fairness and justice will be advanced by such con-

1913.]

Severs v. Commissioners et al.

struction, but the contrary. In *Anderson v. Commissioners of Hamilton County*, 12 Ohio St., 635; on page 643, the court say:

“The requirements of a statute authorizing the taking of private property for public use, ought to be strictly pursued.”

By the terms of General Code, 11046, the burden of proof is expressly placed upon the corporation seeking to condemn land, to prove similar questions.

The style of the case does not determine the burden of proof, nor the order in which evidence should be introduced. In a broad sense, the order of the evidence should conform to the burden of proof. While just turned around in its statement, it seems clear that that is just what is meant by the provision of the general statute, Section 5190, Rev. Stat., that:

“3. The party who would be defeated if no evidence were offered on either side must first produce his evidence, and the adverse party must then produce his evidence.”

The case of *Emig v. Commissioners of Clark County*, 1 N. P., 320, is directly in point. It is suggested that that case is not well considered. I think otherwise. True, the rank of the court is subordinate, but that does not make its reasoning any the less clear and convincing.

*Stephens, Law of Ev.*, 175, Article 93, states the law as follows:

“Burden of proof. \* \* \* He who affirms must prove. \* \* \* Whoever desires any court to give judgment as to any legal right or liability dependent on the existence or non-existence of facts which he asserts or denies to exist, must prove that those facts do or do not exist.” See to the same effect, 1 *Phillips, Evidence*, 552; *Best, Evidence*, 265, 266; *Starkie, Evidence*, 585, 586; *Wharton, Evidence*, Sections 353, 357.

And on page 178 of *Stephens, Law on Ev.*, in the notes it is said:

“The general burden of proof upon the main issue does not really shift from the party upon whom it rests at the beginning, but remains upon him throughout the trial.” Citing numerous authorities.

In 2 *Am. & Eng. Enc. Law*, 649, “Burden of proof” is defined to be “The obligation imposed upon a party who alleges the

existence of a fact or thing, necessary in the prosecution or defense of an action, to establish it by proof."

On page 655, it is said:

"Burden of proof and weight of evidence distinguished. The burden of proof remains on the party affirming a fact in support of his case, and does not change in any aspect of the cause; the weight of evidence shifts from side to side in the progress of a trial, according to the nature and strength of the proofs offered in support or denial of the main fact to be established."

On page 656, the following rule laid down in Bailey's *Onus Probandi*, is quoted with approval:

"Rule 1. The issue must be proved by the party who states an affirmative, not by the party who states a negative."

In the absence of authoritative decisions in this state on this subject it seems to me that some light is thrown on the subject by the following cases from other states:

The fact that one party is made plaintiff and another defendant in a case by virtue of the statute has nothing to do with the question of burden of proof; in other words, burden of proof is not governed by the style of the case. *Shaw v. Abbott*, 60 N. H., 564.

The burden of establishing the usefulness and necessity of a road for public or private purposes is wholly and exclusively upon the petitioner for the right of way (*Hays v. Briggs*, 3 Pittsb. Rep., 504). The burden is on the plaintiff to prove that the land sought to be condemned is reasonably necessary. *Spring Valley Water-Works v. Drinkhouse*, 92 Cal., 528.

In an action to open a street the burden is on the plaintiff to allege and prove the use is public. *St. Louis v. Franks*, 78 Mo., 41.

In my judgment, it is clear that the court erred in its charge to the jury above quoted and in the refusal to charge as requested.

Is this such prejudicial error as necessitates the reversal of this case?

In *McNutt v. Kaufman*, 26 Ohio St., 127, the syllabus in full is as follows:

1913.]

Severs v. Commissioners et al.

“A misdirection of the jury, as to the burden of proof, is error for which the judgment will be reversed at the instance of the party prejudiced thereby.

“A reviewing court having found such error to exist, will not look into the testimony for the purpose of ascertaining whether the verdict is sustained by the weight of the evidence.”

On pages 130 and 131 the court say :

“It is contended, however, for the defendant here, that the judgment should not be disturbed on account of this error in the charge, because the testimony (the whole of which is set out in the record) shows, as it is claimed, that the verdict was clearly right. In answer, it is enough to say that the plaintiffs in error are entitled to have the issues of fact in the case determined by a jury properly instructed as to the burden of proof.”

This case is decisive of the proposition. In justice to the court below, however, I want to say that I do not think this difficult question was there quite fairly presented by either side. Both were looking for an advantage, and yet, I can not say that either side waived the point, or that they were not within their legal rights. It is perhaps true that counsel had not considered the matter with the care which should have been given to the subject.

The fifth assignment of error is that: “The verdict is contrary to the evidence and the law.”

In this connection I desire also to refer to the claim that the proposed improvement is substantially identical with an existing township ditch, and that, as it affirmatively appears that the township trustees have not refused to act, that the county commissioners had no jurisdiction. That the proposed improvement in all respects except the three laterals is substantially identical in route with the existing township ditch, can not be successfully denied, but the addition of these three laterals prevented that ground of complaint being well taken in the petition in error prosecuted direct from the action of the county commissioners and which I have already decided. I speak of this simply to dispose of it, and to prevent misapprehension in regard to what I further say of the case.

I now recur to the fifth assignment of error: The court in its general charge said:

“If you find from the evidence that a public township ditch has been heretofore established along the line of the proposed improvement, and that such ditch, if properly cleaned out, would afford sufficient drainage for the lots and lands sought to be drained by the proposed ditch, then you should return a verdict against the improvement.”

In special instruction No. 1, requested by plaintiffs in error, and given to the jury, the court also said:

“If you find from the evidence that a township ditch has been heretofore established along the line of the proposed improvement, and that such ditch, if properly cleaned out to the depth at which said ditch was originally constructed, would afford sufficient drainage for the lots and lands sought to be drained by the proposed ditch, as located by the county commissioners, then your verdict should be against the establishment of the proposed improvement.”

In my judgment these instructions correctly and clearly state the law on the point which they were designed to cover. *Lake Erie & W. Ry. v. Commissioners of Hancock County, supra*. I can state my judgment under this fifth assignment of error more clearly by first speaking of the entire improvement, except the three laterals, and then speaking of the three laterals, and then the entire improvement as ordered by the commissioners including the laterals.

In my judgment there is no substantial conflict in this evidence upon the proposition that if this original township ditch was properly cleaned out to its original depth, and so kept cleaned out, that it would afford entirely adequate drainage to all the lots and lands sought to be drained by the proposed improvement.

Independently of the three laterals, then, it is manifest that the jury disregarded the law as given to them in the above charge of the court. In other words, independently of the three laterals, there is substantially no evidence to support the finding of the jury on that point.

Coming, then, to the three laterals: Does the evidence justify the finding of the jury that the establishment of these three laterals, or either of them, “will be conducive to the public health, convenience, or welfare?” The statement on this point can not



1913.]

Severs v. Commissioners et al.

be made with the same positiveness as that which I have made with reference to the main ditch, but the finding of the jury on that subject is certainly clearly and manifestly against the weight of the evidence.

Indeed, if we eliminate conclusions, which it seems to me are clearly shown by the evidence of the parties stating such conclusions to be based upon a wholly erroneous conception of the law, in my judgment there is substantially no evidence to sustain the claim that the establishment of these three laterals, or any one or more of them, will be "conductive to the public health, convenience, or welfare."

If my conclusions as thus stated separately are correct, I can not conceive how by their combination the facts are changed, or that the law applicable to those facts would be different.

The mistake in this regard was not with the court, except that it should have set the verdict of the jury aside. The mistake was made by the jury and arose either out of a disregard of the evidence, or the application to the evidence of wholly erroneous notions of the law, notwithstanding and in disregard of the charge of the court.

I am not unmindful of the favor with which the courts have looked upon improvements, which have for their purpose the drainage of this country. Much can be said on that general subject, and I am not aware that the bent of my mind is opposed to that liberal view, on the contrary I strongly favor it; but, there certainly is a limit, and that line can not be crossed without resulting in unjustifiably taking private property, not to promote the general welfare but solely to advance the advantage of individual men, as distinguished from the public. In *Lake Erie & W. Ry. v. Commissioners of Hancock County*, *supra*, the court, upon page 27, say:

"The law undoubtedly requires something more than mere private and individual advantage to sustain an improvement of this nature."

And the Supreme Court seemed to approve the following language quoted from the charge of the court below in that case:

“The prosperity of each individual conduces, in a certain sense, to the public welfare, but the fact is not sufficient reason for taking other private property to increase the prosperity of individual men.”

In *Chesbrough v. Commissioners*, 37 Ohio St., 508, the court, on page 516, say:

“Public welfare, health and convenience, in this connection, are terms used in contradistinction for a mere private benefit.”

Again:

“It is a finding that it is for the public welfare as distinguished from a mere private advantage.”

The Constitution forbids such an invasion of private property. See *Reeves v. Treasurer of Wood County*, 8 Ohio St., 333, where on page 346, the court say:

“But it is a much more serious subject of inquiry, whether this section does not, in effect, authorize the entry upon lands and the construction of drains, when demanded by private interest merely, without reference to the public interest, convenience, or welfare. It seems to us clear that it does.”

The principles decided in the case of *McQuillen v. Hatton*, 42 Ohio St., 202, seem to me to be directly in point here. The syllabus of that case in full is:

“The facts being ascertained, the question whether or not a ditch will conduce to the public health, convenience or welfare, within the meaning of Revised Statutes, Section 4511, so that it will be of public use, is a question of law; and the mere fact the larger and better crops may be raised on two farms sought to be drained, does not authorize the establishment of the ditch.”

Without stopping to quote from it, I cite and ask counsel to read the entire opinion in that case.

But it requires an examination of the facts in this case before the rules of law, just quoted, can be applied.

Is it the duty of the court for that purpose, to look at the facts as disclosed by the record? A contemplation of the size of this record, and of the rather disagreeable character of the task,

1913.]

Severs v. Commissioners et al.

would certainly incline one to let the responsibility on this branch of the case rest where we find it, but I am forced to the conclusion that that would be an evasion, rather than an honest discharge of a judicial duty.

It is claimed by defendants in error, in substance, that because the jury are authorized to consider and weigh as evidence, what they saw upon the view, that, notwithstanding the recital of the record that it contains all of the evidence, that, in the nature of things, that recital can not be regarded as true, and that, therefore, the court does not have all of the evidence before it, and that, the rule that even in a case where a review is authorized, the court will not reverse on the weight of the evidence unless it affirmatively appears that it has all of the evidence before it, applies, and is decisive of this branch of the case.

If the conclusions which I have come to, with reference to findings from the evidence, involved taking a different view from the jury upon a question of fact upon which the evidence was substantially conflicting (and by that I mean a pure question of fact, as distinguished from a question of law, or a mixed question of law and fact), then the question raised above would have direct application. That question, in my judgment, is one of great difficulty, and much can be said upon either side of it. But I do not feel that that question is necessarily involved in reaching the conclusions which I have come to on this branch of the case. In my judgment the jury misapprehended, or disregarded the law as laid down for them in the charge of the court. Applying the law last above quoted to the substantially admitted facts, the verdict of the jury is substantially without evidence to support it. Nor am I unmindful that as I do not know what the jury saw on the view that, in a certain sense, I do not have all of the evidence before me upon which the jury may have based its findings on this point. But it seems to me that the cases of *Lake Erie & W. Ry. v. Commissioners of Hancock County*, *supra*, and *McQuillen v. Hatton*, 42 Ohio St., 202, clearly indicate that it is the duty of the court to examine the record upon a question of this kind. The same view by the jury was provided for when those cases were determined. It may be true that those cases do not go as far as I have gone in the case at bar, but

surely the principle is the same, and I feel that I have not carried that principle beyond its logical limits.

The circuit court of this circuit in passing upon another branch of this litigation said:

“And as I have already said, there is no provision in this section or in any section that we have examined, that provides for the taking of an exception, but a subsequent section does provide that any party who is interested in the improvement who feels aggrieved at the finding of the commissioners, may appeal to the probate court, and there the entire matter may be heard again upon evidence; from the conclusion in that case or the judgment that may be found in that case, error may be prosecuted to the court of common pleas, in which instance a full bill of exceptions may be taken and the errors complained of brought upon the record by its office.”

I do not say that this language necessarily warrants my conclusions, but to my mind it has considerable significance. And, in that connection, the following language used by the court in *Dellogg v. Ely*, 15 Ohio St., 64, on pages 66 and 67, seems pertinent:

“It is evident enough, that when the proceedings in the probate court, on inquiry of damages claimed by him, were ended, the plaintiff below might have proceeded on error to test their legality, and, if erroneous, to reverse them. And when the final order establishing the ditch was made by the county commissioners, he might then have proceeded, on error or by appeal, to question their power and jurisdiction, and to undo what may have been erroneously done. And these remedies, if they had been resorted to, would have had these important recommendations—that whatever had been done erroneously or without authority of law, would have been set aside; officers would have been instructed as to their duties, and parties as to their rights; and proceedings, recommencing from the erroneous point of departure, would have been carried on in strict conformity to law, with all just interests respected, and all rights conserved.”

That there is nothing in the general policy of the law which conflicts with the theory that a review should be allowed in such a case as this, see the strong case of *Blue v. Wentz*, 54 Ohio St., 247, and in *Ferris v. Bramble*, 5 Ohio St., 109, in speaking of a principle much like this, the court say, page 112:

1913.]

Aulen v. Cantor.

“The remedial statute conferring this jurisdiction was entitled to a liberal construction.”

In making the disposition which I have of this case, I have had fully in mind its great importance to the defendants in error as well as to the plaintiffs in error. I presume the principal complaint will be with regard to the conclusions which I draw from the record.

On this subject I simply suggest a careful, candid, unbiased examination of the record.

I do not find any of the other errors assigned well taken. On that relating to peremptory challenges, see *Cincinnati v. Neff*, 19 Bull., 404; *Moore v. Union*, 23 Bull., 48, and *Gram v. Sampson*, 4 C. C., R., 490.

For the errors which I have enumerated, the cause is reversed, and remanded to the probate court for further proceedings.

---

### DAMAGES FOR INJURY TO A MINOR.

Common Pleas Court of Hamilton County.

CARL AULEN, BY CHARLES AULEN, HIS NEXT FRIEND,  
V. JULIUS CANTOR.

Decided, July 2, 1912.

*Infants—Pleading in Action for Injuries to Minor—Real Plaintiff the Minor, Though Suit is by Next Friend—Section 7997.*

In an action by a minor through his next friend for damages for personal injuries, a motion lies to strike from the petition items of expense for board, lodging and medical care as being irrelevant and immaterial.

*H. L. Hohenstein and Nicholas J. Hoban, for plaintiff.*  
*Robertson & Buchwalter and Theodore C. Jung, contra.*

DICKSON, J.

The plaintiff minor, by his next friend, in this case his father, brings this action to recover damages for personal injuries re-

ceived by being hit by a horse driven by the defendant. Among the damages sought are expenses for board and lodging and medical care and attention.

The defendant moves to strike these items from the petition, being "irrelevant and immaterial," because the minor has no right of action for such items because the father is liable therefor, and hence would be entitled to any damages thereto. A minor has as such no standing in court, hence some one must represent him (Section 11247, General Code). The real plaintiff here is the infant and not the next friend. A father is liable for the support of his minor child (Section 7997, General Code). It is his duty to support his minor child. The father has a right to the earnings of his minor child. The next friend need not be the father. Any adult can act as the next friend. The father has a right of action for the loss of the services of his child. The father here has a cause of action against the defendant for certain unusual expenses of board and lodging and unusual expenses for medical care and attention. It is not right that the defendant should be liable for the same damages to two people—the father and the child; that he should pay for the same thing twice; hence the motion to strike out will be granted.

If the action had proceeded and the defendant had paid the infant these items, the father being the next friend in the action and having consented to the payment to the child, of course could not recover, but such is not the case here. The defendant has made his motion in time and it must be granted.

1913.]

Keyler v. Eustis.

**EASEMENT FOR A DRAIN.**

Superior Court of Cincinnati.

LILIAN M. KEYLER V. IRENE C. EUSTIS.

Decided, January 20, 1913.

*Easements—Drain Carried Across an Adjoining Lot Belonging to the Same Owner—Both Lots Subsequently Pass to New Owners—Easement for Drains of Strict Necessity, and Easements by Implication.*

1. Where the owner of two lots of land, on which he has built houses drains one house by means of a private sewer which is laid through the other lot, and subsequently sells and conveys the house so drained, himself retaining the other lot, an easement is thereby created to continue the use of such private sewer, provided such easement is of a permanent nature, apparent, and beneficial to the premises so sold and conveyed.
2. In such case, where the use of the drain is not granted by the conveyance, but the premises are conveyed with all "appurtenances," "rights," or "privileges," the easement is created by implication.
3. But where, in such case the grantee is ignorant of the existence of the drain, and the same is not *apparent* on examination of the premises conveyed, no easement is created, except in case of *strict necessity*.
4. There can be no implied easement of drainage by *strict necessity*, where a privy-vault or cess-pool can be constructed on the premises which will take up the drainage even though the construction thereof will involve considerable expense and be less convenient than the drain, and may detract from the appearance and value of the property.
5. Where such an easement has been created by implication, and thereafter the grantor sells and conveys the servient tenement, and the conveyance does not mention the easement, and there is nothing in the appearance or condition of the premises to put the purchaser on inquiry, and the latter pays the purchase money and receives his conveyance without having knowledge of such easement, the easement is extinguished and he takes the property free of the same.

*Shattuck & Sawyer and Eugene Adler, for plaintiff.*

*Colon Schott, contra.*

PUGH, J.

The plaintiff, Mrs. Keyler, and the defendant, Mrs. Eustis, are owners of adjoining lots of land, located at the southeast corner of Michigan and Wabash avenues in the city of Cincinnati.

Michigan avenue runs north and south, and Wabash avenue intersects it at right angles. Mrs. Eustis owns the corner lot, which fronts fifty feet on Michigan avenue, and Mrs. Keyler owns the lot next east, which fronts fifty-five feet on Wabash avenue. There is a public sewer in Michigan avenue, but none in Wabash avenue, and a subterranean drain runs from Mrs. Keyler's house westwardly through the lot belonging to Mrs. Eustis and empties into the Michigan avenue sewer. Early in December last, the defendant, Mrs. Eustis, caused the drain to be broken through at a point on her own premises, and the ends cemented up so as to entirely shut off the drainage from the Keyler house.

This is an action for a mandatory injunction to compel the defendant to re-open the drain, and for damages.

The history of the drain, so far as it concerns this case, is as follows:

On or before September 20th, 1906, Mrs. Frances F. Diehl was the owner of a tract of land, which abutted one hundred feet on the east side of Michigan avenue and two hundred feet on the south side of Wabash avenue. This tract was divided into three lots, as follows:

A lot, beginning on the east side of Michigan Avenue, fifty feet south of the intersection with Wabash avenue, and running back eastwardly, one hundred and fifty feet, was improved by the erection of a house thereon, and sold to one Varian.

Later, a lot fronting fifty-five feet on the south side of Wabash avenue, beginning one hundred and forty-five feet east of the intersection of Michigan avenue, and running south one hundred feet, was improved by the construction of a residence thereon, and was sold and conveyed to Otto Luedeking, by deed dated September 20th, 1906. It should be stated that this lot for the first fifty feet of its depth is fifty-five feet wide, and the other

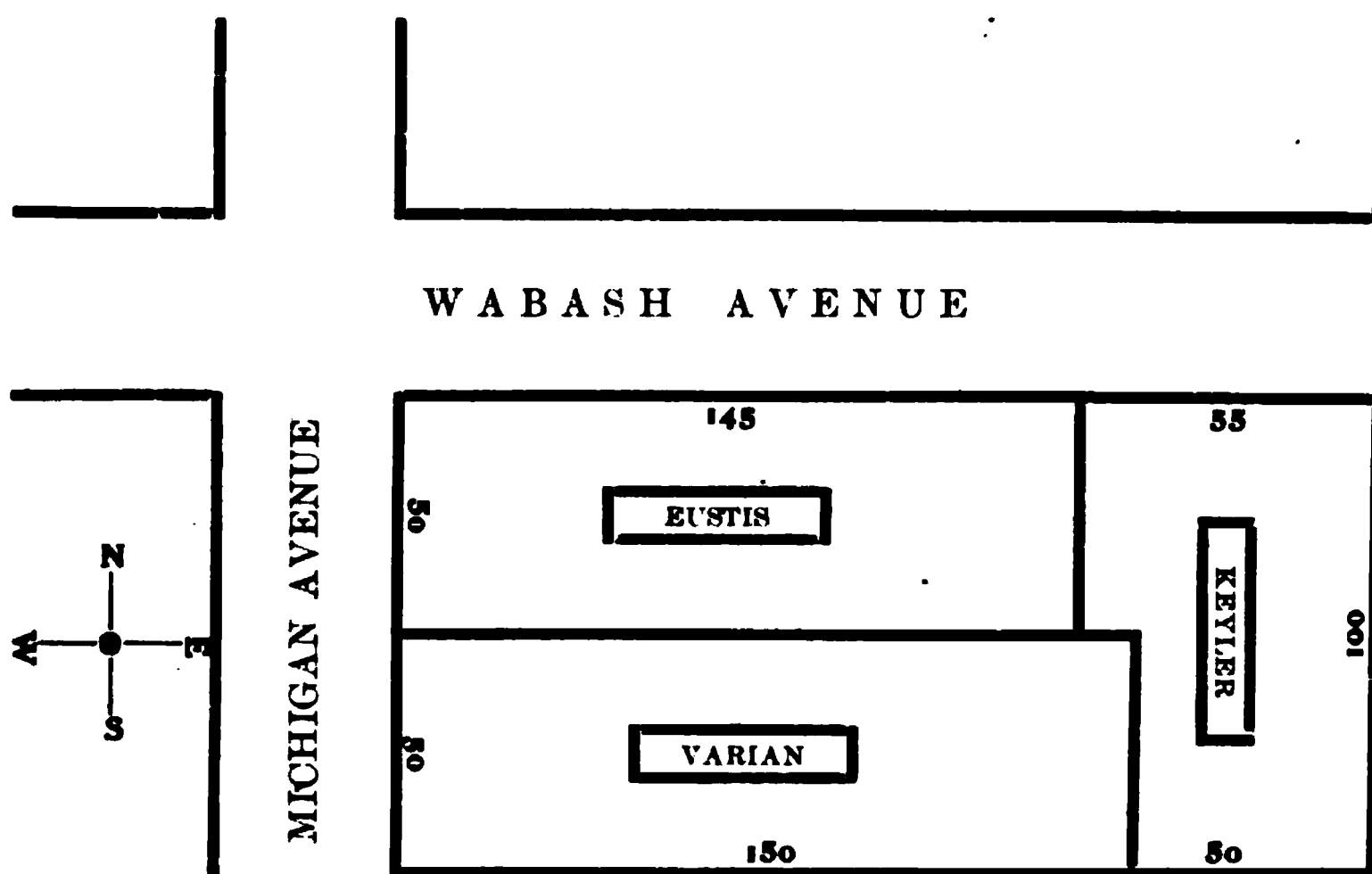


1913.]

Keyler v. Eustis.

fifty feet of its depth only fifty feet wide. For convenience, we will call this the Keyler lot, as it now belongs to the plaintiff.

Still later, a house was built on the remaining lot and it was sold and conveyed to Amanda J. Helman, by deed dated June 21st, 1907. This lot we will call the Eustis lot, as the defendant now owns it. It fronts fifty feet on Michigan avenue, and runs back eastwardly one hundred and forty-five feet to the Keyler lot. The diagram indicates the relation of the lots to each other.



Before any of the lots were sold, Mrs. Diehl had a subterranean drain laid, which runs westwardly from the Keyler house, crosses the east line of the Eustis lot, and, continuing on through said lot, connects with the public sewer in Michigan avenue. The houses on the three lots were all at one time connected with this drain, but later, the drainage of the Varian house was carried directly into the public sewer in the street, and its connection with the drain entirely broken off.

When the drain was built does not certainly appear, nor is it necessary in this case to ascertain. It was laid before either the Keyler lot or the Eustis lot was sold and while both were owned by Mrs. Diehl. It is not possible at present to locate the drain

itself with any precision, but it is agreed that it runs entirely through the Eustis lot. The defendant says it runs beneath her house, and although this is denied, there are circumstances which go far toward supporting this claim.

The plaintiff is suffering and will continue to suffer hardship unless the drain is re-opened, as there exists at present no other way of draining her house. On the other hand the testimony shows that, before the drain was cut, there was an escape of sewer gas into the defendant's house, which threatened to render the lower part of it uninhabitable, and that since the drainage from the Keyler premises has been shut off there has been no further trouble.

Whether the drain can be repaired so as to prevent sewer gas getting into Mrs. Eustis' house, or whether under present circumstances a larger pipe would be required, is not shown. Probably the later, as the quantity of drainage has increased since the drain was laid.

The plaintiff has offered to pay \$100 to have the drain re-opened and for any necessary repairs. This she would probably have to do in any event, as ordinarily repairs necessary to the maintenance of an easement must be made by the owner of the dominant estate. *Bank v. Cunningham*, 46 O. S., 575, 588; *Lyon v. Fels*, 8 Ohio N. P., 450.

(1). As stated, on September 20th, 1906, Mrs. Diehl sold and conveyed the Keyler lot to Luedeking, but there was no mention in the deed of the drain nor anything therein from which its existence could be inferred. The conveyance, however, was of the premises, "together with all the privileges and appurtenances to the same belonging." The testimony shows that Luedeking, the grantee, knew nothing of the existence of any drain, and, when he asked about the sewer and possible assessments therefor, was told it was all attended to and paid for.

When this conveyance was made the drain was in existence and the Keyler house connected therewith. It had not been in use, simply because the house had not yet been occupied. Mrs. Diehl retained ownership of the Eustis lot across which the drain was laid.

1913.]

Keyler v. Eustis.

It is claimed for plaintiff that the effect of this conveyance was to establish an easement of drainage in favor of the Keyler lot and to impose a corresponding servitude on the property retained by the grantor.

When an owner of land has subjected one part of it to a permanent and apparent use for purposes of drainage, in favor of another part, which is reasonably necessary to the full enjoyment of the part so conveyed, and thereafter sells and conveys the part for the benefit of which such use was intended, himself retaining the other part, an easement to continue such use attaches to the part so conveyed, although the easement is not mentioned in the grant other than as an "appurtenance," "right" or "privilege." *Morgan v. Mason*, 20 Ohio St., 401; *Bank v. Cunningham*, 46 Ohio St., 575, 587; *Shield v. Titus*, 46 Ohio St., 528, 539; *Baker v. Rice*, 56 Ohio St., 463; *Weber v. Miller*, 9 Ohio C. C., 674; *Mesher v. Hibbs*, 1 Ohio C.C.(N.S.), 49; *Tiffany, Modern Law of Real Property*, Section 317.

An easement thus established is said to be created "by implication." The implication is that the grantor intended to convey and the grantee to acquire such easement. The rule is therefore said to be based on *intention*.

While both lots are owned by the same person, no such easement can exist, but such subjection of the one to the use of the other is called a *quasi*-easement which may thereafter ripen into an actual easement, if the property gets into the hands of a third person.

The *quasi*-easement in this case was of a *permanent* kind, and something quite different from a mere parol license, as claimed. Furthermore, when the use of the drain once began, it was *continuous* and of great convenience and benefit to the premises so conveyed.

It remains to enquire whether it was *apparent*. If it was so, there is no difficulty in inferring the grantor's intention to convey and the grantee's intention to acquire an easement of drainage.

But, where such *quasi*-easement is not mentioned in the conveyance, other than in such general terms as an "appurte-

nance," "right" or "privilege," and the grantee has no actual knowledge of it, and its existence is not apparent on examination of the premises, it is not easy to infer an intention to convey or acquire it. Indeed, the implication would seem to be the other way. The grantee, knowing nothing of such drain, it can hardly be said to have been an inducement to him to purchase the property at the price actually paid.

The rule, as above stated, will always therefore be found limited to cases where the alleged easement was either actually known to the grantee at the time he acquired the property, or where it was *apparent* on inspection of the premises or *visibly* dependent thereon.

Thus, the alleged easement must be "openly and plainly attached to or imposed on it" (the land), *Baker v. Rice*, 56 Ohio St., 475; or "visibly dependent," *Bank v. Cunningham*, 46 Ohio St., 575; or "apparent," *Mesher v. Hibbs*, 1 Ohio C. C., 49; or "obvious and apparent," *Bell v. Bell*, 7 Ohio N. P., 150.

In *Washburn on Easements* (4th Ed.), it is stated, p. 96, that the so-called easement must be "such as is indicated by the condition of the premises at the time of the grant."

In *Lampman v. Milks*, 21 N. Y., 505, a leading case on the subject, at page 507, the expression used is "open and visible."

In *Butterworth v. Crawford*, 46 N. Y., 349, also a leading case, it is said, page 352, no easement is thus created except "where the marks of the burden are open and visible," and, in the syllabus, the rule is thus stated:

"The rule of law which creates an easement in favor of one of two tenements or heritages belonging to a single owner, upon the sale of one of them, is confined to cases where there is an *apparent* sign of servitude on the part of the other, which would indicate its existence to a person reasonably familiar with the subject upon an inspection of the premises."

In *Tiffany, Modern Law of Real Property*, Section 317, the qualification is thus stated:

"That an easement to be thus created by implied grant, must be apparent is conceded by all the decisions, and it is apparent, it is said, for this purpose, if its existence is indicated by signs

1913.]

Keyler v. Eustis.

which must necessarily be seen, or which may be seen or known on a careful inspection by a person ordinarily conversant with the subject. Accordingly, the question whether a drain or aqueduct which is underground or covered by buildings is apparent for the purpose of the rule depends, it seems, on whether there is any object in sight on the land purchased, such as a pump or sink which would indicate the presence of the aqueduct or drain."

In *Hardy v. McCullough*, 23 Grattan, 259 (Va.), the rule is thus laid down:

"Whether the estate sold be the dominant or servient estate, it is well settled by numerous cases in England and in the states of the Union that the easement or other incident of property must be open, visible, apparent and continuous."

In accord with the above, are decisions from many states: *Carbrey v. Willis*, 7 Allen, 364; *Tool Co. v. Engine Co.*, 9 R. I., 564; *Brown v. Fuller*, 165 Mich., 162; *Whiting v. Gaylord*, 66 Conn., 337; *Ellis v. Barrett*, 128 Ind., 118; *Carmen v. Boyd*, 73 Pa., 179; *Wells v. Garbutt*, 132 N. Y., 430; *Tooth v. Bryce*, 50 N. J. Eq., 589; *Janes v. Jenkins*, 34 Md., 1; *Cihak v. Klekr*, 117 Ill., 363; *Power Co. v. Veghte*, 21 N. J. Eq., 463; *Buss v. Dyer*, 125 Mass., 287; *Kelly v. Dunning*, 43 N. J. Eq., 62; *Scott v. Bentel*, 23 Grattan, 1; *Kenyon v. Nichols*, 1 R. I., 417; 2 *Warvelle on Vendors*, Sections 533, 534.

The drain in this instance was entirely subterranean. Nothing short of excavation would reveal its existence. It was apparent, of course, that the Keyler house drained somewhere, but an examination of the premises was made by two successive purchasers, Luedeking and Mrs. Keyler, and neither of them found anything to suggest an underground drain. Mrs. Keyler inferred that the drainage was into a sewer in Wabash avenue, and Luedeking probably believed the same. There was so little reason to believe there was a drain that Mrs. Keyler, after living for some time in the house and being told about it by Mrs. Helman, her neighbor, refused to credit it. It was from six to eight feet below ground. No connection with it was visible on the premises. Mr. Diehl, who acted for his wife in the sales of

these lots, testified that he intended the permanent use of the drain to go with the Keyler house. Why, then, did he not say so in the conveyance, or, at least, inform Luedeking, his purchaser, of its existence? It was stated during the trial with much appearance of truth, that it might embarrass the sale of the Keyler house if it was known that it was not connected with a public sewer, and further that the drain, as constructed, was in violation of the rules of the board of health, and so might become a source of trouble thereafter. Be that as it may, it is quite clear that if Diehl intended the purchaser to have the benefit of the drain, he did not intend to have it known that there was such a drain, until, at least, both lots were sold. As will presently appear the existence of the drain was not disclosed when the Eustis lot—the alleged servient tenement—was subsequently sold.

From Luedeking, the Keyler lot passed to the plaintiff by deed dated October 15th, 1907. This conveyance also failed to mention the drain, but contained the following clause, "This conveyance also includes all rights, appurtenant to and running with the premises hereby conveyed applying and running with the part of said lot No. Fifty-eight (58) formerly owned by Frances F. Diehl, said part being at the southeast corner of Wabash and Michigan avenues," and it is argued that this is a grant of the right of the drainage in question.

There are two answers, each conclusive, to this contention: First, as already seen, Luedeking, the plaintiff's grantor, had no easement of drainage, though he may have believed he had. Under the decisions quoted, no easement was ever created. Second, this clause is a reference to a covenant contained in the conveyance from Mrs. Diehl to Luedeking, whereby the former binds herself, her heirs and assigns, not to erect or maintain any "stable or other structure in any way offensive or objectionable \* \* \* upon said part of said lot No. 58 still owned by said Frances F. Diehl." When Mrs. Diehl subsequently conveyed such part of lot No. 58 to Amanda Helman, this same restriction appears again in the deed, but very much narrowed, thus: "It is agreed that no stable or barn shall ever be erected

1913.]

Keyler v. Eustis.

upon the lot herein conveyed.” The absence of any reference to the drain in either deed, viz., of the Keyler lot to Luedeking or of the Eustis lot to Mrs. Helman, the alleged and dominant tenements is very significant under the circumstances.

If Luedeking got no easement of drainage over the Eustis lot by the conveyance to him of the Keyler lot, obviously Mrs. Keyler could get no such easement by any conveyance from Luedeking, no matter what the conveyance contained on the subject.

(2). If, however, the *quasi*-easement of drainage, as it existed at the time of the conveyance of the Keyler lot to Luedeking, were one of *strict necessity*, and not merely one of greater or less convenience, comfort or expense, even in case of ignorance of its existence by Luedeking and in the absence of appearances or signs on the premises indicating its existence, where there is reason to believe that the grantor intended the use of the drain to become an easement appendant to the premises, I think the law would create it by implication, though I have found no well considered decision exactly in point.

The testimony shows that the use of this drain would be of great convenience and benefit to the property. It is not, however, an easement of *strict necessity*. A privy-vault or cess-pool, which will take up this drainage, could have been constructed upon the lot by Luedeking, and it can now be done as well by the plaintiff. It is true, this will put the plaintiff to some expense, and when built, it will not be as convenient or even as sanitary as a well constructed drain, it may detract from the appearance of the place, and, in some degree lessen the value of the property. But it will obviate the necessity of maintaining the drain, and where such vault or cess-pool can be so constructed, there can be no easement of *strict necessity*. *Brown v. Fuller*, 165 Mich., 162.

(3). Coming now to the consideration of the questions involved from the standpoint of the defendant:

After the conveyance of the Keyler premises to Luedeking on September 20th, 1906, Mrs. Diehl sold and conveyed the Eustis lot to Amanda J. Helman, June 21st, 1907. The deed imposed a restriction on the use of the premises for a stable or barn,

but contained no other restriction or reservation whatever. There is no mention at all of the drain.

The law is well settled that an easement may be granted by implication on property retained by a grantor when such easement is reasonably necessary or even of great convenience to a full enjoyment of the estate conveyed, even though it be not one of *strict necessity*. *Baker v. Rice*, 56 Ohio St., 463; *Cave v. Crafts*, 53 Cal., 135; *Kelly v. Dunning*, 43 N. J. Eq., 62; *Cihak v. Klekr*, 117 Ill., 363.

But where it is claimed that an easement is reserved by implication from a grant, even though the use of the part of the land conveyed for the benefit of the part of the land retained or not conveyed is well known to both parties, such easement must be one of *strict necessity*. It is in derogation of the grant and nothing less than stringent need can overcome the rule that a grantor can not derogate from his grant by implication.

The case of *Meredith v. Franks et al*, 56 Ohio St., 479, is exactly in point. Syllabus 2 is as follows:

“It is a general rule that one can not derogate from his grant; so that to warrant the inference of a way reserved by implication, it must be one of strict necessity to the remaining lands of the grantor; it is not merely a matter of convenience and if the grantor has another mode of access to his land, however, inconvenient, he can not claim a way by implication in the lands conveyed, though he may have been in the use of a way over it to a public highway at and a long time before the conveyance, and of which the grantee had notice at the time.”

Without further quotation of authorities, the following are cited as decisions to the same effect on the same point: *Brown v. Fuller*, 165 Mich., 162; *Carey v. Rice*, 58 Cal., 159; *Collins v. Prentice*, 15 Conn., 39; *Walker v. Clifford*, 128 Ala., 67; *Stevens v. Orr*, 69 Maine, 323; *Burns v. Gallagher*, 62 Md., 462.

In all of the cases above cited the grantor had himself retained the so-called dominant tenement, while, in the present instance, he had already disposed of it by conveyance to Luedeking. There is nothing, however, in this circumstance to prevent the application of the rule. If he had retained the Keyler lot, no



1913.]

Keyler v. Eustis.

easement would have been reserved in his favor against a purchaser of the Eustis lot, except by *strict necessity*, and, since he has parted with it, the same rule should apply to anyone claiming through him. Such easement is not appendant to the person but to the property.

Hence it is apparent that no servitude was imposed upon the Eustis property by implication arising from the sale and conveyance of the same by Mrs. Diehl to Mrs. Helman.

(4). There is another consideration which likewise leads to the conclusion that the Eustis premises can not be subjected to this servitude of drainage.

When Mrs. Helman acquired the lot, June 21st, 1907, and paid the consideration and received a conveyance of the entire estate, with no reservation or restriction whatever (except as to the maintainance of a barn or stable) she had no notice, actual or constructive, of the concealed drain. This makes her a *bona fide* purchaser, and, under the well established rule in equity, no prior claim of an interest in the property can be asserted against her. Even if it is conceded that, while Mrs. Diehl remained owner of the Eustis lot, there existed an easement of drainage across it appendant to the Keyler premises, such easement was cut off and extinguished as soon as the servient tenement came into the hands of a *bona fide* purchase without notice.

As already stated, Mrs. Helman acquired the property without having been informed of the existence of the drain, and the fact, as it seems to be, that she afterwards learned of it is immaterial. Her rights and obligations with respect to the premises were determined by the conditions existing at the time of the purchase. There was no mention of the easement in the conveyance, nor anything in the condition of the premises to put her on enquiry. The clause in the deed from Luedeking to Mrs. Keyler, hereinbefore quoted, even if construed as a reference to the drain in nowise affected her; it was not in the chain of title to the lot she bought, and the deed containing it was not executed until nearly four months after the conveyance to her of the Eustis lot.

As *bona fide* purchaser she took the property free of the alleged easement (*Treadwell v. Inslee*, 120 N. Y., 458, 465; *Gas Light*

*Co. v. Meyerhardt*, 61 Ga., 287; *Taggart v. Warner*, 83 Wis., 1; *McCann v. Day*, 57 Ill., 101; 1 *Tiffany*, *Modern Law of Real Property*, Section 333). The rule as stated, is recognized in *Spicer v. Waters*, 65 Barb., 227, 231; *Baurman v. Griffiths*, 35 Neb., 361, 366; *Jewett v. Palmer*, 7 Johns Ch., 65, although its application was denied in these cases as the purchasers had parted with nothing of value.

Any other finding than this would require the court to say that a purchaser in good faith of land, who has examined the title of record and found it free and clear of any burden, and who has no knowledge of any claim against the property and finds nothing in the appearance of the premises to put him on enquiry, and who then buys the land and pays full value therefor, and receives a conveyance from the owner of record, containing no reservation or restrictions whatever, may none the less have the property subjected to a servitude which will materially diminish the value of the estate and impair its use for the purposes for which he bought it.

If Luedeking had enquired as to whether there was a public sewer on Wabash avenue whereon the Keyler lot fronted, and whether the house was connected with it, he would have learned that there was no such sewer and that the premises were dependent on a private drain laid across the adjoining lot. As this property was then the property of his grantor, he could have insisted on a definite conveyance to him of an easement of drainage by means of the existing drain, and such conveyance could have been recorded so as to be notice to anyone thereafter acquiring the servient tenement and thereby furnish him ample protection. It would have been no more than the exercise of the same degree of care which secured him from the erection of a barn or stable on the Eustis lot.

When Mrs. Keyler bought the lot, Luedeking, of course had no power to grant her any easement, and Mrs. Diehl no longer owned the Eustis lot. If, however, instead of assuming that the house drained into a sewer in Wabash avenue, she had ascertained the real state of affairs, as ordinary prudence required, she could have made some arrangement with Mrs. Helman, who

1913.]

Robinson v. Robinson et al.

then owned the adjoining property, or, failing that, have declined to buy it.

From the foregoing it follows that the plaintiff is not entitled to the relief sought, and her petition will therefore be dismissed.

---

### **PRESUMPTION AGAINST INTESTACY.**

Common Pleas Court of Cuyahoga County.

W. SCOTT ROBINSON, EXECUTOR OF THE ESTATE OF M. LOUISE  
BOWLER, DECEASED, v. JOHN T. ROBINSON ET AL.

Decided, January 27, 1913.

*Wills—Residuary Clause May Be Followed by Other Bequests—Partial Wills Almost Unknown, and a Presumption Arises Against Intestacy as to Any Part of an Estate—Words and Phrases.*

1. The will of B provided in one of its clauses that "all of my effects and household goods not mentioned above is to be divided between," etc. *Held:* That said clause is residuary, notwithstanding it is followed by other bequests.
2. The doctrine of *ejusdem generis* is limited in its application to clauses not residuary, and the word "effects" as above used is therefore not limited to property of the same general character and description as household goods.
3. Where a provision in a will is equivocal or of doubtful or uncertain meaning, the terms of the residuary clause will be so construed as to prevent intestacy; and this rule gives to the children in this case the entire estate share and share, except the specific legacies named therein.

NEFF, J.

This case involves the construction to be given to the last will and testament of M. Louise Bowler. Plaintiff alleges his appointment and qualification as executor of the last will and testament of M. Louise Bowler; that the testatrix died on the 24th day of October, 1909; that the will in question was duly admitted to probate in the Probate Court of Cuyahoga County. It is also averred that the estate of the testatrix is of the value

of about ten thousand dollars, and that all the debts of the estate have been paid; that decedent left no husband; that the persons named in the petition are the only heirs at law of the testatrix.

A doubt has arisen as to the proper meaning and effect to be given to the clause of the will to which reference will be made later; that the executor is uncertain as to the proper construction to be given to such clause, and prays that the court may, by its decree, give direction to the plaintiff in regard to the true construction of said will, and the proper execution of the executor's trust, and as to what the plaintiff's duties are in the premises.

A copy of the will is attached to the petition, from which it appears that the instrument in question was executed in the month of July, 1903. the exact date of the execution of the will not otherwise appearing.

The will provides that, after paying the funeral expenses, she gives to various persons divers sums of money ranging from \$250 up to \$1,000. She then gives to other relatives certain articles of jewelry, and then comes the clause which requires construction, which is in the language following:

"All of my effects and household goods not mentioned above is to be divided equally between the said C. Courtland and Kenneth Draper Means, as my executors think proper. If said property is sold, said children shall share and share alike in said proceeds."

That is followed by these bequests:

"I give to my grand-nephews, Charles Henry and Clinton S. Robinson, \$250 each."

The case was submitted in the first instance upon the following agreed statement of facts:

"The testatrix. M. Louise Bowler, was not at the time of executing her said will the owner of any real estate, nor was she seized of any real estate at the time of her death.

"2. At the time of executing her said will she was the owner of a block of stock in a corporation organized for the purpose

1913.]

Robinson v. Robinson et al.

of owning and dealing in real estate, and which corporation was the owner of certain real estate in Cuyahoga county.

“3. That said testatrix had disposed of substantially all of said stock before her death.

“4. That Exhibit A hereto attached is a complete list of the personal property of said testatrix at the time of her death, excepting articles specifically bequeathed in her will.

“5. That the sum of \$8,820.15 shown in said statement being cash on deposit in the Society for Savings, is a part of the proceeds of said shares of stock.”

There is then a list set out of all the items of personal property belonging to the decedent testatrix, at the time of her death.

It being uncertain as to how much money the testatrix had on deposit at the time of the execution of the will, upon the suggestion of the court a supplemental agreed statement of facts was submitted by counsel, from which it appears that at the time of the execution of the will the testatrix had on deposit in the Society for Savings \$2,075.24.

On the 18th day of April, 1904, the testatrix, in her own handwriting, wrote upon the face of the will these words:

“Remainder of my            all of my real estate, of whatever nature, I want divided equally between my brothers, John T. and W. Scott Robinson.”

The words “of my real” were erased, but not so completely but that they are somewhat legible.

This change appears to have been made in the handwriting of the testatrix. The testatrix, however, owned no real estate, either at the date of the execution of the will or at the time of her death. The only property which she owned which savored in any degree at all of realty was a block of stock in a corporation organized for the purpose of owning and dealing in real estate, such corporation being the owner of certain real estate in Cuyahoga county.

In addition to such block of stock, the testatrix, at the time of her death, owned household goods, certain articles of jewelry, and had the sum of \$8,820.15 on deposit in the Society for Savings.

The claim of the plaintiff is, that the clause in question does not dispose of the stock held by the testatrix; and that, as to such stock and the amount realized from its sale, the decedent died intestate.

On the other hand, the claim of C. Courtland Means and Kenneth Draper Means is, that by the clause of the will in question such stock and the avails of such sale of stock were devised to them, and that therefore the decedent did not die intestate as to any of her property.

Stated with more particularity, the claim of the plaintiff is as follows: That the word "effects," as it appears in this clause, is used in immediate connection with the words "household goods," and that the context shows that the doctrine of *ejusdem generis* applies and limits the meaning of the word "effects" to property of the same general character and description as household goods. Second, that the clause "if said property is sold, said children shall share and share alike," could manifestly not apply to money on deposit in the bank, which could not be the subject of sale. Third, that the attempted but ineffectual effort to change her will, made by decedent on April 18th, 1904, shows that the decedent did not conceive that by the terms of the clause in question she had disposed of the shares of stock which she owned at the time of the execution of the will in July, 1903. Fourth, that the clause in question is not residuary, because it is followed by other bequests.

On the other hand, the two defendants above named contend that the clause in question is residuary, that it comprehends all the decedent's effects not mentioned in the will. Second, that as this clause is residuary in its character, the doctrine of *ejusdem generis* does not apply. Third, that the specific provisions of the will disposed of only about one-fifth of decedent's estate; and that to give the construction contended for by plaintiff would result in holding that decedent died intestate as to four-fifths of her estate. Fourth, that the presumption is that the testatrix intended to dispose of all her estate. Fifth, that in any event the language of the clause in question is equivocal, and that the presumption against intestacy would

1913.]

Robinson v. Robinson et al.

require that any doubtful terms of the will should be given such construction as would prevent intestacy.

The primary duty of the court is to ascertain the intention of the testator. When that is found, of course that controls.

To do this, the court should give to the language employed in the will its plain and ordinary meaning. The words used are, however, to be construed with reference to their context. And in construing a will, the court is, if such a course be reasonable, so to construe particular provisions of the instrument as to give reasonable effect to all of its provisions.

The first thing to be determined is the meaning of the word "effects."

Black, in his law dictionary, on page 409, defines effects to be personal estate or property. This word has been held to be more comprehensive than the word "goods," as it includes fixtures, which "goods" will not include. In wills, the word "effects" is equivalent to "property" or "worldly substance," and, if used *simpliciter*, as in a gift of "all my effects," will carry the whole personal estate. The addition of the words "real and personal" will extend it so as to embrace the whole of the testator's real and personal estate. This is a word often found in wills, and, being equivalent to "property," or worldly substance," its force depends greatly upon the association of the adjectives "real and personal." "Real and personal effects" would embrace the whole estate; but the word "effects" alone must be confined to personal estate simply, unless an intention appears to the contrary.

Standing alone, the word "effects" is undoubtedly sufficiently comprehensive to include shares of stock. This is conceded by the plaintiff. Plaintiff contends that, inasmuch as the word "effects" is followed by the words "and household goods," such additional words serve to show that the word "effects" was used in a restrictive sense, or, in other words, that the doctrine of *ejusdem generis* has application. This would certainly be true if the clause in question is not residuary.

In the case of *Arthur v. Morgan*, 112 U. S., 499, Mr. Justice Blatchford, in the course of the opinion, uses this language:

“The word ‘effects’ means ‘property or wordly substance.’ When it is accompanied, in a will, by words of narrower import the bequest, if not residuary, may be confined to species of property *ejusdem generis* with those previously described.”

I think it must be manifest, on principle, that the doctrine of *ejusdem generis* must be restricted in its application to clauses which are not residuary. The office of a residuary clause is to dispose of the residue of the estate, whatever the character of such residue may be.

In the case of *Morton v. Woodbury*, 153 N. Y. Reports, 243, the first branch of the syllabus is as follows:

“*Will—Residuary Legatee.*—No particular mode of expression is necessary to constitute a residuary legatee; it is sufficient if the intention of the testator be plainly expressed in the will, that the surplus of his estate, after payment of debts and legacies, shall be taken by a person there designated.

“2. *Position of Residuary Clause.*—While the residuary clause in wills is usually the last of its disposing provisions, still, the mere fact that it is not the last, is not of controlling consequence, and can have no effect except as it bears upon the question of the intent of the testator.”

In support of the syllabus, the court, on page 251 of the opinion, cites *Williams on Executors* (7th Am. Ed.), 801; 1 *Jarman on Wills* (6th Am. Ed.), 724.

In the 7th Volume of *Words & Phrases Judicially Defined*, page 6168, is found the following language:

“A residuary clause in a will is a clause which operates to pass all of testator’s property not previously disposed of, and it includes legacies which may lapse by events subsequent to the making of a will, or property covered by illegal legacies, or legacies which for some reason are prevented from taking effect.” Citing *Riker v. Cornwell*, 113 N. Y., 115.

“A general residuary clause includes all property of the testator not otherwise disposed of. The presumption is that it includes everything not otherwise disposed of, and the burden rests upon the heir at law or next of kin to show that the testator did not intend his residuary clause to include such property. It carries every real interest, whether known or unknown, immediate or remote, unless it is manifestly excluded, and, when



1913.]

Robinson v. Robinson et al.

not circumscribed by clear expression in other parts of a will, includes any property or interest of the testator not otherwise perfectly disposed of, and all that for any reason eventually falls into the general residue." Citing *Lamb v. Lamb*, 14 N. Y. Supp., 206, 210.

"A residuary legatee is a legatee who is given all the residuum of a testator's estate after specific devises and bequests have been made therefrom." Citing *Lafferty v. Peoples Savings Bank*, 43 N. W., 34, 36.

It is contended, however, that the clause in question is not a residuary clause, because it is followed by an additional bequest. Ordinarily and naturally the residuary clause is the last clause of the will; but as already indicated in the syllabus of the Morton case, 153 N. Y., 243, this is not a controlling consideration.

In *Jarman on Wills*, Vol. 1, page 1029, bottom of the page:

"A gift of household goods, furniture 'and all other effects' is sufficient to pass the general personal estate, although it is followed by pecuniary and specific bequests, and even although specific bequests are given to the person who takes the residue under the general gift."

In support of the doctrine enunciated in the text, the author cites *In bonis Shephard*, 48 L. J. Pr., 62; *Fleming v. Burrows*, 1 Russ., 276.

In the case of *Hodgson v. Jax*, 2 Ch. Div., 122, the syllabus is as follows:

"Where a testatrix, after devising certain freehold property, bequeathed to her sister for life, with remainder to her brother's children, 'all of my furniture, plate, linen, and other effects that may be in my possession at the time of my death,' she was at the time of her death entitled to the property devised to her by her will, to furniture, plate, linen, wearing apparel, jewelry and certain sums of money. *Held*: That the defendants were entitled to the residuary personal estate of the testatrix. Jessel. M. R., says:

"I am of the opinion that, under this gift, the residuary personal estate of the testatrix must be taken to pass. The words are 'all my furniture, plate, linen, and other effects that may be in my possession at the time of my death.' It is alleged

that the words 'other effects' are to be cut down so as to mean that which is something like furniture, plate or linen; but the answer is that the words of a will ought to have their natural meaning given to them, unless there is some contrary intention appearing in the will. The mere fact that the testatrix enumerates some items before the words 'and other effects,' does not alter the proper meaning of those words.

"The demurrer must be overruled."

I think it results that the position of the clause in a will is not determinative of the question as to whether the clause is residuary, but that that must depend upon the terms used. And inasmuch as the word "all," which is the most comprehensive word in the English language, perhaps, is used in this clause, I am disposed to hold that the clause is residuary in its character, and that therefore the doctrine of *ejusdem generis* would not have controlling application.

Various cases have been cited by counsel on both sides which bear by analogy upon the question as to the proper construction to be given to the language of the clause in question.

In 13 Vesey, Jr's., Reports, page 39, the case of *Rawlings v. Jennings*, the syllabus reads:

"To the word 'effects' in a will restrained to articles *ejusdem generis* with those specified; though the consequence was a residue undisposed of."

Sir William Grant, Master of the Rolls, observes that the terms of the will are very obscure. In the course of the opinion he says:

"The second question arises upon the widow's claim of the whole residue of the personal estate, as passing to her under the general word 'effects.' That claim can not be sustained. Part of his property being particularly given to her afterwards, the word 'effects' must receive a more limited interpretation, and must be confined to articles *ejusdem generis* with those specified in the preceding part of the sentence: viz, household furniture."

In the case of *Howes v. Seagoe*, 2 Weekly Reporter, 597, the syllabus reads as follows:

1913.]

Robinson v. Robinson et al.

“A testator gave certain specific property, the lease of premises occupied by him in his trade, and effects, to his wife for life, to be accepted by her subject to payment of debts, etc.; and gave certain real estate to his executors, on trust to sell, the proceeds to form part of his residuary estate; and as to all the rest and residue of his estate, of whatever nature, etc., to his next heirs therein equally. Upon the question whether the word ‘effects’ included the residue—*Held*: That it did not; that the word ‘lease’ took in all comprised in the lease, and that the charge was a general one.”

Kindersley, V. C., in the opinion says:

“The first question was as to the word ‘effects.’ That word was capable of meaning all of a testator’s estate—at all events, all his property; but it was here used in a somewhat singular manner as to its immediate antecedents, but not as to all in the same sentence. Immediately afterwards he proceeded to dispose of other real and personal property, showing that he did not consider that he had disposed of all his property; and that appeared in the several gifts that followed, and therefore it was clear that it did not include the residuary bequest; the chief peculiarity being, that he interposed the lease of the premises occupied by him, etc.; and therefore his honor’s opinion was, that the word ‘effects’ did not prevent the subsequent residuary bequest.”

In *Estate of William Lippincott*, 73 Pa. St., 368, the syllabus is as follows:

“When a testator enumerates particular kinds of chattels and couples with them the words ‘effects,’ or equivalent words, the generality of his expression is to be restricted to such species of property as are *ejusdem generis* with the particular words.

“A bequest of ‘my jewelry, wearing apparel, and personal effects, except such of the same as are herein otherwise disposed of,’ does not include furniture in the testator’s dwelling, where the excepted articles ‘otherwise disposed of’ were associated with the person of the testator.”

The court, in the course of the opinion, speaking by Ashman, J., says:

“In choosing the word ‘effects,’ he used a word of the widest scope, which, as Lord Mansfield said ‘is synonymous with worldly

substance' (*Hogan v. Jackson*, 1 Cow., 299), and which, therefore, embraces every form and species of personal estate, and has even, in exceptional cases, passed realty. When a testator accompanies a word of general meaning, like 'effects,' with particulars which are embraced within that meaning, he is influenced by one of two motives—a fear that the particulars may be overlooked, or an intent to restrict the meaning of the general word. It is very certain that this decedent was not actuated by the former consideration; he knew that if he gave his effects to the legatee, he gave her all the personalty he possessed, and he would hardly commit the superfluous folly of particularizing his jewelry and clothing. But, while he could not increase a term which was universal, he could diminish it. And he did this in a double way; by associating it with particulars, and by prefixing to it the adjective 'personal.' The phrase 'personal effects' has obtained, by frequent use, as distinct a defined meaning as the phrase 'household effects.' It designates articles associated with the person, just as the opposite phrase denotes articles belonging to the house. But it gets this meaning by being contrasted with household effects, as when the testator bequeaths his personal and household goods. In this instance, the testator intended to give, specifically, only his personal belongings, and not those of his house, and he did it by connecting personal effects with articles so intimately personal to himself as his jewelry and apparel."

Of course there were two modes of representation used, and the court held that the word "effects" must be restricted to these, when it is associated with other property together with the use of the adjective "personal," and it is this second feature that distinguishes the case in some measure from the case at bar.

In Roper on Legacies, page 280, the text-writer calls attention to the case to which I have already referred as having been decided by Sir William Grant.

"In that case A bequeathed to his wife B an annuity of 200 pounds, part of money he then had in bank security; and thus proceeded, 'together with all my household furniture and 'effects' of what nature or kind soever that I may be possessed of at the time of my decease.' The residuary personal estate being otherwise undisposed of was claimed by B under the word 'effects,' etc. But Sir William Grant determined that the

1913.]

Robinson v. Robinson et al.

claim could not be sustained, observing that as *part* of the property was particularly given to B, the word 'effects' must receive a more limited interpretation, and must be confined to articles *ejusdem generis* with those specified in the preceding part of the sentence, viz., household furniture.

"But in *Campbell v. Prescott* the court would not confine the import of the word 'effects' to articles *ejusdem generis* with those preceding it, and for the reasons after mentioned. There the bequest was of 'all the testator's sugar house, cupola, and merchandise, stock with jewels, plate, household goods, furniture and all effects whatsoever.' The next of kin claimed the general residue as undisposed of, there being no other words to comprise it. But the same judge, who decided the last case, determined that the surplus passed by the word 'effects.'

"It is obvious that the terms of the above bequest were residuary, and that the testator meant to make a general disposition of his personal estate, in doing which he (as is usual) merely enumerated some of its particulars, concluding in the extensive language of 'all his effects whatsoever.' There was no reason, therefore, in this, as there was in the preceding case, to restrain upon inference of intention the natural import of the term 'effects,' to particulars *ejusdem generis* with those previously enumerated.

"A similar instance occurred in the case of *Michell v. Michell*. There the testator devised to his two daughters a house and premises; also a garden and orchard, and 'all his plate, linen, china, household goods and furniture, and effects that he should die possessed of,' making no other disposition of his general personal estate. The court held that the word 'effects' was in a sense detached from the preceding parts of the sentence, and was used by the testator to include the *whole* of his personal property. Or, in other words, the testator adopted the term 'effects' as the most comprehensive expression he could devise to include the disposition of all his personal estate."

These cases referred to by Roper illustrate quite vividly the contradictory character of the adjudications upon this general subject.

Page on Wills, Section 478:

"The word 'effects' is one used *prima facie* to denote personal property only. A bequest to one person of such 'goods, books, clothing, furniture, etc., that he may desire' and giving to others 'the balance of the personal effects,' passes to the last

named beneficiaries the entire personal property of testator except such as is taken by the first beneficiary.

“The context, however, may show the testator did not intend by the word ‘effects’ to pass the whole of his personalty. This intention may be shown by the words descriptive of the property with which ‘effects’ is associated. Thus a gift of ‘all my jewelry, wearing apparel and personal effects’ was held not to include furniture and pictures. Nor does a gift of ‘household furniture and effects’ pass jewelry.

“Testator’s intention to restrict the meaning of ‘effects’ may also be shown by other directions in his will. Thus a provision for the sale of testator’s ‘effects’ was held to show that testator used ‘effects’ as including only property which was in fact subject to sale. Hence money, credits and the like were excluded.

“While the word ‘effects’ *prima facie* applies to personalty only, it is not a word of rigid meaning, and may be used so as to include realty if the context shows testator’s intention so to use it. Thus a devise in which the article of the gift is referred to as ‘furniture, goods, chattels and effects’ in one place, and in another as ‘furniture and moneys or any property,’ was held to pass testator’s real estate. In this case, however, any other construction would have left the testator intestate, practically, as to all his property.”

It will be observed that this section, like most quotations or extracts from text writers, “cuts both ways,” and is evidently all very unsatisfactory, because cases cited there are contradictory.

In *In the Matter of Final Judicial Settlement of the Accounts of Mortimer F. Reynolds, as Executor*, 124 N. Y. Reports, page 388, the first and second branches of the syllabus are as follows:

“It seems that general words, following an enumeration of articles in the residuary clause of a will, are to be given the broadest and most comprehensive meaning of which they are susceptible, in order to prevent intestacy as to any portion of the testator’s estate.

“Except, however, in a residuary clause or where the will contains no such clause, when certain things are named in a devise or bequest, followed by a phrase, which need not, but may be, construed to include other articles, it will be confined to articles of the same general character as those enumerated.”

1913.]

Robinson v. Robinson et al.

The second branch of this syllabus seems to indicate that if the clause be residuary in its character, the doctrine of *ejusdem generis* has no application.

In the course of the opinion, on page 398, the court speaking by Parker, J., says:

“Applying then the rule of construction deducible from the authorities, it may be conceded that if there were no residuary clause in the will, so that as to the money and securities of the amount and value of twelve thousand dollars, Abelard Reynolds would have died intestate, unless it should be held to have passed by the bequests the words ‘and personal property in and upon the same or in any manner connected therewith’ would be given the most comprehensive meaning of which they are susceptible for the purpose of preventing intestacy as to a portion of the estate.”

2 Courts of Probate & Divorce, Law Reports, 1869-72, *In the Goods of Joseph Edward O’Loughlin*, page 101, the syllabus reads as follows:

“A testator left to A whatever money remained at his agent’s and also any money that might result from the sale of his effects, *Held*: That A was not entitled to administration as a residuary legatee.”

In the opinion, page 102:

“Lord Penzance. The words are, *money that may result from the sale of my effects*. Effects must mean, therefore, something that may be sold, but a legacy would not be included in such a definition. I think by the word *effects*, the deceased alluded to that portion of his property only which was subject to sale.”

1 Law Reports, Probate Division, 1891, page 300, *In the Goods of Jupp*:

“A testator bequeathed to his wife ‘all my furniture, jewelry, pictures, wearing apparel, and other effects belonging to me at the time of my decease.’

“The will went on to make specific bequests to his wife of money, shares, securities, etc.; and it directed her to pay his debts, and it left it to her discretion whether she would provide



for his son and daughters by a previous marriage and a nephew. It contained no bequests to any other person:

“*Held*: That the words ‘all other effects’ constituted his wife residuary legatee.”

“JEUNE, J. I think this case a stronger one than those mentioned. Here you have clear words, ‘all other effects,’ and they are not cut down by any principle of *ejusdem generis*, nor by any specific bequests to other persons. They must be taken, therefore, in their full sense.”

In the case of *Reimer's Estate*, 159 Pa. St., 212, the second branch of the syllabus:

“The words ‘personal effects’ in a will, when not restricted by the context, mean everything embraced within the description ‘personal property.’

“Testator, after providing that his debts and funeral expenses should be paid, directed ‘that the whole of my estate remaining shall be divided as follows: First. I give and bequeath to my brother, Andrew, any and all of my household goods, books, clothing, furniture, etc., that he may desire. The balance of the personal effects to be divided among the children of my sister Mary.’ After directing his executors to accumulate rents to the amount of \$5,000 for a monument, he continued: ‘After which I direct my real estate to be divided as follows:’ Then followed six devises of real estate, which included all of the real estate. *Held*: That the second sentence of the first clause of the will was residuary in character, and that all of the testator’s personal property except the household goods, books, etc., bequeathed to his brother, should be distributed to the children of his sister Mary.”

On page 218 of the opinion, the court, quoting from 91 Pa., 507, says:

“‘From all this it would appear that the testator did not intend to die intestate as to any portion of his property, real or personal, and this intention must govern, unless there is something in the devise itself which forces us to a different conclusion; for it is a rule long and well settled that a will must be so construed as to avoid a partial intestacy unless the contrary be unavoidable.’ Applying this doctrine to the facts of that case, this court held that the residuary clause of that will, which directed the executors to sell all the rest and residue of his estate and pay the proceeds to a certain legatee, included money



1913.]

Robinson v. Robinson et al.

which had accrued as dividends on bank stocks and was not a subject of sale.”

The cases to which I have referred are plainly irreconcilable. I am of opinion, however, that the doctrine of *ejusdem generis* is limited in its application to clauses not residuary; and I think such limitation is supported both by reason and authority. I am also of the opinion that the clause in question is residuary, notwithstanding the fact that such clause is followed by other bequests. To hold that the clause in question is not residuary, would be to reject the word “all” entirely, and to attach no significance to it. I am possibly influenced to some extent, in arriving at this conclusion; by the presumption which is universally entertained against intestacy, of which, however, later.

We should next proceed to consider the effect to be given to the following clause in the will: “If said property is sold, said children shall share and share alike in said proceeds.”

Money can not be the subject of sale. The agreed statement of facts, however, shows that at the date of the execution of the will, the testatrix had \$2,075 in money, while the shares of stock were of the value of from six to eight thousand dollars. The fact that the amount of money is inconsiderable as compared with the value of the stock, would tend to diminish the effect contended for as to this clause.

Next, what light is thrown upon the proper construction to be given to the clause in question by the attempted change of the will by testatrix? Plaintiff claims that this attempted change shows that testatrix believed she had not disposed of the shares of stock by the clause in question. There is force in this suggestion, but the force of this suggestion is diminished by the consideration that the attempted change is equally consistent with the supposition that, conceiving that she had given to her grand-nephews the stock in question by the general clause, she decided to change her will in that respect and give these shares of stock to her brothers. This latter consideration, of equal force, I think, to the former, reduces the evidential effect of the first suggestion to zero, for her act in thus attempting to change her will is easily referable to either hypothesis.

We will next proceed to consider the effect to be given to the presumption against intestacy.

*Schouler on Wills*, page 239, Section 490:

“No presumption of an intention to die intestate as to any part of his property is allowable when the words of a testator’s will may fairly carry the whole; for no one is supposed to make his will without meaning to dispose of all his estate. It is further to be presumed that a general residuary gift will carry particular property not otherwise disposed of.”

*Collier v. Collier’s Executors*, 3 O. S., 369, at 374:

“It is a settled rule of construction, that a testator is never presumed to intend to die intestate as to any part of his estate to which his attention seems to have been directed; and a court of equity will put such a construction upon equivocal words as to prevent such a result.”

*Davis v. Corwine*, 25 O. S., 668, at 675:

“Another rule applicable to the interpretation of wills is that the testator will not be presumed to have intended to leave any of his estate undisposed of.”

*Merrick v. Merrick*, 37 O. S., 126, at 131:

“But a testator is not presumed to intend to die intestate as to any interest in his property to which his attention seems to have been directed.”

*McKelvey v. McKelvey*, 43 O. S., 213, at 219:

“A testator is not presumed to die intestate as to any part of his estate.”

*Jarman on Wills*, page 1030:

“When a man makes a will, he is presumed not to intend to die intestate as to any part of his property.”

*James Woodside’s Estate*, 188 Pa. St., 45:

“A partial intestacy is not to be presumed if the words used will carry the whole estate, and a construction is to be given a

1913.]

Robinson v. Robinson et al.

will which will avoid a partial intestacy, unless the contrary is unavoidable.”

*Matter of Miner*, 146 N. Y., 121, at 131:

“The rule of construction requires of the court, in dealing with the language of a residuary gift which is ambiguous, that it should lean in favor of a broad rather than of a restricted construction; for thereby intestacy is prevented, which it is reasonable to suppose testators do not contemplate.” *Lamb v. Lamb*, 131 N. Y., 227.

In the case of *James Woodside's Estate*, 188 Pa. St., 45, the court, in the syllabus, states the doctrine to be:

“A partial intestacy is not to be presumed if the words used will carry the whole estate, and a construction is to be given a will which will avoid a partial intestacy unless the contrary is unavoidable.”

In the case of *Lamb v. Lamb*, 131 N. Y., 227, in the first syllabus the court expresses the doctrine thus:

“In the interpretation of a will, a residuary clause the language of which is ambiguous is to be given a broad rather than a narrow construction, so as to prevent intestacy, and a general residuary clause carries every interest whether known or unknown, immediate or remote, unless it is manifestly excluded; the intention to include is presumed, and an intention to exclude must appear from other parts of the will.”

In the 146 N. Y., *In the Matter of the Probate of the Last Will and Testament of Asher W. Miner*, reported at page 121, the second syllabus is as follows:

“Unless a residuary bequest is circumscribed by clear expressions, and the title of the residuary legatee narrowed by words of unmistakable import, it will, to prevent intestacy, be construed so as to perform the office intended, that is, to dispose of all the residuary estate.”

On page 131 of the opinion, after using the language included in the syllabus which I have just read, and referring to the case of *Riker v. Cornwell*, 113 N. Y., 115, the court proceeds to say:

"The rule of construction requires of the court, in dealing with the language of a residuary gift which is ambiguous, that it should lean in favor of a broad rather than a restricted construction; for thereby 'intestacy is prevented,' which, it is reasonable to suppose, testators do not contemplate."

To the same effect is the case of *Elizabeth F. Floyd v. Charles Carow, as Sole Acting Executor, etc.*, 88 N. Y., 560.

In the fifth syllabus in the case of *Levi P. Morton v. Ellen C. Woodbury*, 153 N. Y., 243, the court say:

"Where the words of a residuary clause are of themselves sufficient to constitute the person named therein a general residuary legatee, a clear expression in the will or special words of unmistakable import are required to render him, the legatee, of a particular, instead of a general residue."

These authorities, both in Ohio and elsewhere, seem to establish the doctrine that where the provisions of a will are equivocal or of uncertain meaning, or are doubtful, the court shall give to the construction of the terms in a residuary clause such meaning as will prevent intestacy. The terms of the clause in question in the case at bar are of doubtful meaning, or at least equivocal. They are susceptible of both constructions contended for by counsel. This being true, the presumption against intestacy would control. And this presumption is not merely an academic one. It is derived from and rests upon the almost uniform and invariable conduct of parties who execute wills, that a person, in making his will, intends thereby to dispose of all his estate, is well nigh universal; while a partial will, intending to dispose of only a portion of the testator's estate, leaving to the laws of descent and distribution the division of the estate, is exceptional and exceedingly rare. I have myself never been called upon to draw such a will, nor have I in my personal experience known of a will partial in its terms. Besides this, unless this court allows the presumption to control in this case, the court must necessarily hold that the testatrix intended to dispose of about a fourth or fifth of her estate by will, and to leave three-fourths or four-fifths of her estate to the tender mercies of the laws of descent and distribution.

1913.]

Cincinnati v. Fogarty.

In view of the foregoing, I am disposed to hold, and do hold, that the will of the testatrix gave to C. Courtland Means and Kenneth Draper Means all of her estate except the specific legacies named therein; and the executor is directed to execute his trust as executor pursuant to such interpretation of said will, and a decree may be taken accordingly.

---

**LIMITATIONS OF ACTIONS FOR RECOVERY OF TAX  
ASSESSMENTS. .**

Common Pleas Court of Hamilton County.

CITY OF CINCINNATI V. WILLIAM FOGARTY ET AL.

Decided, January 23, 1913.

*Assessments—Character of Action for Recovery of—Application of the  
Statute of Limitations.*

An action for recovery of unpaid street assessments is an action upon a liability created by statute, and is therefore controlled by the six years statute of limitations.

*Otway J. Cosgrave and Wm. M. Tugman, for Emil Hornberg.  
Pogue, Campbell & Groom, for the treasurer.*

DICKSON, J.

There are \$4,375 proceeds of the sale of certain real estate in this court for distribution on motion. Of this sum \$1,493.66 is claimed by the county treasurer for certain assessments. During argument it was agreed that \$175.31 assessed against this real estate is for the appropriation of Reading road and wrongfully claimed by the treasurer under the decision in the case of *Norwood v. Baker*, 172 U. S., 269. This amount eliminated leaves \$1,318.35 in dispute. This amount is for street assessments for the improvement of the Reading road. The first of the ten installments was due October 8, 1892, the last October

8, 1901, and all in the said sum of \$1,318.85. All of these installments were duly certified to the county auditor.

The act of April 14, 1902, 95 O. L., 93, now Section 2667 of the General Code, in force, provides that no statute of limitations shall apply to actions by treasurers for the recovery of tax assessments. And this act also provides that it shall apply to all existing causes of action.

The issue is, which if any of the ten installments are barred by the statutes of limitation? And if barred by a statute of limitation, which statute, that of the six year or the ten year limitation?

Actions upon a liability created by statute are barred in six years.

The court is of the opinion that the cause of action here is upon a liability created by statute and is controlled by the six year statute.

While it is true this action is in the nature of relief in the marshaling of liens and in foreclosure by a treasurer, yet this will not prevent this action from being one upon a liability created by statute—six years rather than one for relief of ten years.

Section 3897 of the General Code provides that municipal assessments are payable by the owners personally, hence are a personal charge against the property owner.

And Section 3906 of the General Code provides that such assessments are a lien upon the property and remain so until collected.

The court is of the opinion that assessments may be collected—that is satisfied, extinguished by payment or by repose, and these sections do not militate against the statutes of limitation.

The court has not the amounts of the various installments barred and not barred, and requests counsel to ascertain the same and prepare the decree of distribution in accord with this opinion.

1913.]

Railway v. Roth, Treasurer.

**LIABILITY TO TAXATION OF RAILWAY TERMINALS OWNED  
BY A MUNICIPALITY.**

Superior Court of Cincinnati.

TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY V. CHARLES E.  
ROTH, TREASURER OF HAMILTON COUNTY, AND ROBERT E.  
EDMONDSON, AUDITOR OF HAMILTON COUNTY.

Decided, February 12, 1913.

*Taxation—Municipally Owned Property Not Used for Any Governmental  
Function—Properly Placed on the Tax Duplicate—Railway Viaduct  
and Terminals Owned by the City of Cincinnati—Held Subject to  
Taxation—Section 5399.*

1. There is no exemption from taxation by implication in Ohio. Article XII, Section 2, of the Constitution does not create exemptions; it merely authorizes the General Assembly to exempt certain kinds of property. Therefore no exemptions can exist unless found in the statutes in plain, unambiguous words.
2. The public property which is exempt from taxation by the laws of Ohio does not include all municipally owned property, but only such public property as is employed in the exercise of some governmental function.
3. A railroad owned and operated by a municipality is not employed by it in the exercise of any purely governmental function, but in the exercise of its proprietary or private functions, and is not exempt from taxation by the state.
4. Section 5399 of the General Code does not prevent the county auditor from placing upon the tax duplicate municipally owned real estate omitted therefrom during previous years.
5. The act of May 10, 1910 (101 O. L., 399), creating a tax commission, was not intended to give to such commission any control over the property of municipal corporations.

*John R. Sayler, W. T. Porter and Harmon, Colston, Goldsmith  
& Hoadly, for plaintiffs.*

*Thomas L. Pogue, Prosecuting Attorney, and John V. Camp-  
bell and Charles A. Groom, Assistant Prosecuting Attorneys,  
contra.*

OPPENHEIMER, J.

Plaintiffs allege that they are a board of trustees appointed under the act of May 4, 1869, and authorized to construct and maintain a railway from Cincinnati to Chattanooga, Tenn.; that under the authority thus conferred upon them they have constructed such railway and leased it to the Cincinnati, New Orleans & Texas Pacific Railway Company, by which it is now operated; that by the act of April 23, 1898, and the vote of the qualified electors of Cincinnati, they were authorized to borrow a sum not to exceed \$2,500,000 for the purpose of providing terminal facilities and permanent betterments for said railway; that they have, in the exercise of this power, obtained property in Cincinnati by proper appropriation proceedings, and erected thereon a freight station costing more than a million and a half of dollars; that they have acquired other property for a right-of-way between the line of said road and said freight station, and have constructed a viaduct which they intend to connect with said freight station; that the tracks upon said right-of-way and viaduct have not yet been connected with the freight station, so that no portion thereof has been turned over to the Cincinnati, New Orleans & Pacific Railway Company, or come under the operation of its lease, but that when completed it will form a portion of the line of railway of the Cincinnati Southern Railway.

Plaintiffs further allege that the auditor of Hamilton county has certified to the treasurer taxes in the sum of \$505.40 upon said right-of-way, being the last half of the taxes for the year 1910, payable in June, 1911; that he has likewise placed said viaduct upon the tax duplicate at a valuation of \$96,000 for the year 1910, and \$189,500 for the year 1911, and has entered the taxes thereon, amounting to \$8,662.22, and certified them to the treasurer.

By amendment to this cause of action, plaintiffs further allege that in the performance of all these acts, they were merely acting as trustees, the sole beneficiary of their trust being the city of Cincinnati, and that the valuations placed upon said viaduct by said county auditor was the value of the unfinished viaduct.



1913.]

Railway v. Roth, Treasurer.

The second cause of action reaffirms the preceding allegations, and asserts that the county auditor exceeded his authority in adding to the tax duplicate in the year 1911, property omitted therefrom prior to the year 1910.

The third cause of action likewise reaffirms the allegations of the first cause, and adds that even if the right-of-way and viaduct have passed, by operation of the aforementioned lease, to the C., N. O. & T. P. Ry. Co., the auditor may not fix the valuation of the property and enter it upon the duplicate, because such duty devolves exclusively upon the tax commission by virtue of the act of May 10, 1910 (101 O. L., 399).

To these several causes of action defendants have demurred. As to the first cause of action they contend that the property is taxable because it is not employed by the municipality in the performance of any governmental function; as to the second cause, that the act of May 31, 1911, does not prohibit the assessment and taxation of property for the year 1909; and as to the third cause, that the act of May 10, 1910, which created the tax commission, has no application to property owned by municipal corporations.

Taxes have been defined by Judge Cooley as "the enforced proportional contribution from persons and property, levied by the state by virtue of its sovereignty for the support of government and for all public needs" (Cooley, *Taxation*, p. 1). "The power of taxation," he says (p. 7), "is an incident of sovereignty, and is possessed by the government without being expressly conferred by the people. It is a legislative power; and when the people by their constitutions, create a department of government upon which they confer the power to make laws, the power of taxation is conferred as part of the more general power."

This is a recognition of the elementary proposition that the power of taxation is a necessary incident of sovereignty. Without such power, governments could not be maintained. It is inherent primarily in the people themselves, and is by them committed to and vested exclusively in the legislative body by virtue of the general grant of legislative power. Constitutional pro-

visions are merely limitations upon the exercise of this power, beyond which the Legislature is not permitted to go.

Not merely was this fundamental proposition recognized by those who urged upon the people the adoption of the Federal Constitution (Federalist, Nos. XXX to XXXV), but it was also clearly enunciated by that great expounder of the Constitution, Chief Justice Marshall, in the oft-cited case of *McCulloch v. Maryland*, 4 Wheaton, 316, 428:

“It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax the Legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.

“The people of a state, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government can not be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse. \* \* \*

“It may be objected to this definition, that the power of taxation is not confined to the people and property of a state. It may be exercised upon every object brought within its jurisdiction.

“This is true. But to what source do we trace this right? It is obvious that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. This proposition may be almost pronounced self-evident.”

These principles were substantially affirmed by the Supreme Court of this state in the early cases of *Bonsal v. Lebanon*, 19 Ohio, 418; *Scovill v. Cleveland*, 1 Ohio St., 127; and *Hill v. Higdon*, 5 Ohio St., 243. In the last mentioned case the court speaking through Chief Justice Ranney, said (p. 245):

1913.]

Railway v. Roth, Treasurer.

“That (the power of taxation) was a power liable to abuse, and very often abused, was conceded; but, as the people had made a plenary delegation of authority, and had imposed no positive restrictions upon its exercise, it was thought to be clear that they relied for protection upon the wisdom and justice of the representative body, and the accountability of its members to them, rather than the restraining powers of the courts of law.”

Again in the case of *Western Union Telegraph Company v. Mayer*, 28 Ohio St., 521, our Supreme Court has pertinently said (p. 533):

“The power of the state to collect taxes for public purposes, is an inherent and indispensable incident of sovereignty. Without it no civilized state could discharge its functions.

“This power would exist without a written constitution. The object of constitutional provisions is to regulate its exercise by such limitations and restrictions as will protect the people against unjust or arbitrary action of the governing power. \* \*

\* The Constitution (Article II, Section 1) provides, that ‘the legislative power of the state shall be vested in the General Assembly.’

“The power to raise revenue for public purposes, being a legislative power, is thus expressly committed to the General Assembly. It is a grant of general power of taxation. Limitations and restrictions on its exercise are to be found in other provisions of that instrument, and in the Federal Constitution. Thus Article XII, which relates to taxation, is not, as seems to be supposed, a delegation of authority to raise revenue, but a limitation of that power as conferred by Article II, Section 1.”

It is not necessary to multiply citations or to indulge in prolix explanations of this apparently undisputed principle of law, the disregard of which is, according to Mr. James Gray (*Limitations of the Taxing Power*, Section 534), “reckoned by historians among the chief causes of both the English and the American Revolutions.”

We have seen that the constitutional limitation upon this general legislative power of taxation is found in Article XII, Section 2, of the Constitution. So far as it is pertinent to the question now at issue, it provides as follows:

“Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property according to its true value in money, excepting bonds of the state of Ohio, bonds of any city, village, hamlet, county, or township in this state, and bonds issued in behalf of the public schools of Ohio and the means of instruction in connection therewith, which bonds shall be exempt from taxation; but burying grounds, public schoolhouses, houses used exclusively for public worship, institutions of purely public charity, public property used exclusively for any public purpose, and personal property, to an amount not exceeding in value two hundred dollars for each individual, may, by general laws, be exempt from taxation.” \* \* \*

It is manifest that this section is not self-executing. It does not tax property. But it is mandatory, and requires the General Assembly to pass laws in accordance with its provisions. It recognizes the existence of the power of taxation, granted to the legislative body by virtue of Article II, Section 1, of the same instrument, and prescribes certain rules and limitations which must be observed in the exercise of that power. Nor does it create any exemptions, except as to certain classes of bonds; it merely authorizes the General Assembly, if it sees fit, to exempt by general laws, certain definitely enumerated kinds of property.

In pursuance of this constitutional requirement, the General Assembly has enacted Section 5328 of the General Code, which reads, in part:

“All real or personal property in this state, belonging to individuals or corporations, and all moneys, credits, investments in bonds, stocks, or otherwise, of persons residing in this state, shall be subject to taxation, except only such property as may be expressly exempted therefrom.” \* \* \*

And in the exercise of its constitutional authority to exempt certain property from taxation, the General Assembly has enacted Sections 5349 to 5365-1, inclusive, of the General Code. These sections specifically exempt public schoolhouses and houses used exclusively for public worship, graveyards, courthouses and jails, buildings and lands used exclusively for the accommodation or support of the poor, armory buildings, apparatus used for the

1913.]

Railway v. Roth, Treasurer.

extinguishment of fires, market houses, public grounds, halls used exclusively for public purposes, water-works, and certain kinds of stocks and other property which do not now demand our attention.

We do not believe that argument or citation of authority will be necessary to show that the word "corporations," as used in Section 5328 of the General Code, heretofore quoted, includes municipal corporations. It is perfectly manifest that Article XII, Section 2, of the Constitution, authorizing the exemption of "public property used exclusively for any public purpose," necessarily implies the taxation, in the manner previously indicated, of all public property otherwise employed.

At this point it may be well to emphasize another proposition to which reference has heretofore been made, viz., that every presumption is in favor of the taxation of property, and every presumption against its exemption. He who alleges that certain property is exempt must sustain his position by cogent proof. As was said by our Supreme Court, in *Lee v. Sturgis*, 46 Ohio St., 153, 159 (quoting with approval from *Railway Co. v. Supervisors*, 93 U. S., 595):

"Where an exception or exemption is claimed, the intention of the General Assembly to except must be expressed in clear and unambiguous terms. 'The exemption must be shown indubitably to exist. At the outset every presumption is against it. A well founded doubt is fatal to the claim. It is only where the terms of the concession are too explicit to admit fairly of any other construction that the proposition can be supported.' Intent to confer immunity from taxation must be clear beyond a reasonable doubt, for, as in case of a claim of grant, nothing can be taken against the state by presumption or inference."

This doctrine has been repeatedly enunciated by the Supreme Court of Ohio, but we shall content ourselves with referring to *Cincinnati v. State*, 19 Ohio, 110, 115; *Lander v. Burke*, 65 Ohio St., 532, 542; *Watterson v. Halliday*, 77 Ohio St., 150, 171. And the same doctrine has found expression in *Providence Bank v. Billings*, 4 Pet., 514, 561; *St. Louis v. Railway Co.*, 210 U. S., 266, 273-4; *People v. Tax Commissioners*, 174 N. Y., 417, 448;

*Cooley, Constitutional Limitations*, 740, note 1; *Dillon, Municipal Corporations*, 5th Ed., Section 1401; 28 Cyc., 1687-8; 37 Cyc., 874-7.

We are now brought directly to a consideration of the first and most important question raised by defendant's demurrer: Is the property described in the petition exempt from taxation? Plaintiffs contend that it is municipal property used for municipal purposes, and that it is *ipso facto* exempt.

Even if we assume that it is "public property used exclusively for" a "public purpose," within the meaning of Article XII, Section 2 of the Constitution, it does not follow necessarily that it is exempt; for we have seen that this section does not of itself create any exemptions. It merely empowers the Legislature to pass laws exempting such property; and therefore the exemption does not exist unless it is created in "clear and unambiguous terms" by one of the sections of the General Code to which we have already referred.

However, let us carefully examine this contention of plaintiffs, so that we may determine whether this is in reality property which is used for a "public purpose," within the meaning of the Constitution.

A municipal corporation is possessed of a two-fold or double character. In the one aspect it is a social community, dealing with human beings and the problems to which their inter-relationship gives rise; in the other aspect it is a business community, concerning itself with the financial and commercial affairs which find expression in terms of the current coin of the realm. In the former aspect, it exercises ordinary legislative and governmental powers, aiding the state in properly governing that portion of its people residing within the municipality; in the other aspect, it exercises powers and is the recipient of privileges and franchises such as might be, and frequently are, conferred upon individuals or private corporations. And while the latter powers and franchises are public in their nature, in that they are conferred presumably for the public benefit, yet they may likewise be considered private, in that they result in special advantage, profit or benefit to the municipality as distinct from the public at large.

1913.]

Railway v. Roth, Treasurer.

The former character may properly be designated *governmental, legislative or public*; the latter *proprietary or private*. In its governmental or public character, the municipality is made one of the instrumentalities of the state, for the purpose of exercising, in its behalf, certain limited and prescribed political powers. Over these powers the Legislature is, in the last analysis, absolutely supreme, unless in the state Constitution there is some limitation upon legislative control. In its proprietary or private character, the municipality exercises powers or functions which are conferred upon it in its corporate capacity, for the benefit of the legal entity which was created when the municipal corporation was chartered or organized. As to the latter powers and functions, and as to property acquired and contracts executed in the course of their exercise, the power of the Legislature is by no means omnipotent; for they are protected by the same constitutional guaranties as those which shield the property of individuals from legislative aggression. See *Board of Education v. Blodgett*, 155 Ill., 441.

The two-fold or dual nature of municipal administration is particularly important in two connections,—(a) in determining questions of liability for damages resulting from negligent execution of municipal powers, and (b) in considering the extent of legislative control. With the former, we have in this case, nothing to do; but with the latter we are seriously concerned.

This distinction has been universally recognized, one of the leading cases upon the subject being *Proprietors of Mount Hope Cemetery v. Boston*, 158 Mass., 509. In this case the court, consisting of men of splendid attainments, says (pp. 511-2):

“Over property which a city or town has acquired and holds exclusively for purposes deemed strictly public, that is, which the city or town holds merely as an agency of the state government for the performance of the strictly public duties devolved upon it, the Legislature may exercise a control to the extent of requiring the city or town, without receiving compensation therefor, to transfer such property to some other agency of the government appointed to perform similar duties, and to be used for similar purposes, or perhaps for other purposes strictly public in their character. \* \* \*



“By a quite general concurrence of opinion, however, this legislative power of control is not universal, and does not extend to property acquired by a city or town for special purposes not deemed strictly and exclusively public and political, but in respect to which a city or town is deemed rather to have a right of private ownership, of which it can not be deprived against its will, save by the right of eminent domain with payment of compensation. This distinction we deem to be well founded, but no exact or full enumeration can be made of the kinds of property which will fall within it, because in different states similar kinds of property may be held under different laws and with different duties and obligations, so that a kind of property might in one state be held strictly for public uses, while in another state it might not be. But the general doctrine that cities and towns may have a private ownership of property which can not be wholly controlled by the state government, though the uses of it may be in part for the benefit of the community as a community, and not merely as individuals, is now well established in most jurisdictions where the question has arisen.”

This distinction has also been frequently recognized by the Supreme Court of this state, and is specially referred to in the case of *Cincinnati v. Lewis, Auditor*, 66 Ohio St., 49, at p. 56:

“The description of municipal property which is exempt from taxation indicates with unmistakable accuracy that *the exemption is to extend to such property only as is actually employed in the exercise of municipal functions.*”

Again in the recent case of *Cincinnati v. Hynicka, Treasurer*, decided by the Supreme Court without report (84 O. S., 446) the same distinction must have been recognized, for it was necessarily involved in the case, and was made the basis of argument by the successful counsel.

In 28 Cyc., 267-9, there is an interesting and exhaustive discussion of the two classes into which the functions of municipal corporations are divisible. These two classes are designated as the *governmental functions* and *municipal functions*, and numerous cases are cited in support of the propositions contained in the text. The subject is also treated in an instructive manner in *McQuillan on Municipal Corporations*, Section 87, where the



1913.]

Railway v. Roth, Treasurer.

case of *Walker v. Cincinnati*, 21 Ohio St., 14, is cited as an illustration. Indeed, we find absolutely no author of any repute who treats of the functions of municipal corporations, who does not call attention to the distinction to which we have been referring. It may be, as said by Judge Dillon (Mun. Corp., Sec. 38), that the view that a municipal corporation possesses a double character "is true only in a modified sense"; but even that learned author subsequently recognizes and lays particular emphasis upon these differences in municipal functions (*Ibid*, Sections 39, 109, 1398, 1644).

It seems perfectly manifest to us that the Cincinnati Southern Railway is not employed by the municipality in the exercise of any purely governmental function. It was built with the proceeds of bonds issued by the municipality itself. It was a *public* property, created for *public* service, but it was owned by the city, and leased by it to the Cincinnati, New Orleans & Texas Pacific Railway Company, in its *proprietary character*.

Now even if we were to admit that certain exemptions may be implied from the nature of governmental institutions, the property with which we are now concerned could not be brought within that class which is exempt by implication. In other words, such exemptions extend only to property employed in the exercise of functions governmental in character. The rule is thus explained by Gray in his *Limitations of Taxing Power* (Section 1341):

"Municipalities are only *quasi*-governmental, and different considerations apply to the taxation of their property. The general rule with respect to state taxation of the property of such corporations, sometimes regarded as an implied limitation arising out of the general nature of our public institutions, and sometimes expressed in written constitutional restrictions, is, that the Legislature may not tax—or rather, *will not be deemed to have intended to tax*—the property of municipal corporations owned and used by them in carrying out their strictly governmental functions, *but that the other property of such corporations, held for commercial purposes, or for the convenience or profit of its citizens, is subject to state taxation, at the will of the Legislature.*"

But we reiterate that we do not wish to be understood as admitting that there is in Ohio any such thing as tax-exemption by implication. As we have heretofore endeavored to indicate, the people were careful to specify in the Constitution just what property *might* be exempted by the General Assembly; and that body proceeded, in pursuance of the authority thus delegated to it, to specify what property was actually exempt. Nothing is left to implication; but, as has already been said, the exemption must be found in plain, unambiguous words, or it does not exist. We are entirely content with the exercise of the judicial function of interpreting the existing law; we have no desire to usurp the legislative function. Indeed, we do not hesitate to say that if the General Assembly had gone so far as to exempt public property *not* used exclusively for public purposes, its acts would be clearly unconstitutional and void. *Zanesville v. Richards, Auditor*, 5 Ohio St., 590; *Fields v. Commissioners Highland County*, 36 Ohio St., 476; *State v. Jones, Auditor*, 51 Ohio St., 492, 505.

The case of *Cincinnati v. Lewis, Auditor*, 66 Ohio St., 49, is particularly in point. In that case the city of Cincinnati sought to enjoin the collection of taxes upon certain real estate owned by it and known as the Markley farm, which was originally purchased for the purpose of erecting a municipal water-works thereon. The syllabus reads as follows:

“The ownership of lands by a municipal corporation does not bring them within any statutory exemption from taxation unless they are used in the exercise of a municipal function, and this is true although they are leased by the municipality and the money realized is applied to a public purpose.”

The court says (pp. 55-6) :

“That the public ownership of property was not alone thought sufficient to exempt it from taxation is made obvious by the requirement that an exclusive use for a public purpose shall coincide with such ownership.”

And again (pp. 56-7) :

1913.]

Railway v. Roth, Treasurer.

“The description of municipal property which is exempt from taxation indicates with unmistakable accuracy that the exemption is to extend to such property only as is actually employed in the exercise of municipal functions. If this conclusion were doubtful it would nevertheless be required by the established rule that all exemptions from taxation are to be strictly construed.”

This case is distinguished by the learned counsel for plaintiffs, from the case at bar, by the fact that the public use had been abandoned. But the truth of the matter is that although the *public ownership* continued, and although the revenue derived from the rental of the land was employed for purely *public purposes*, yet the property was, by the change in use, taken out of a specifically exempted class, and it became therefore the subject of taxation.

The suggestion is made that because the property in question is owned by the municipality, and the revenue therefrom is devoted to municipal uses, it is not logical to diminish that revenue by taxation for public purposes. This objection, however, is more specious than substantial, for it must be remembered that, in the language of the court in *Cincinnati v. Lewis, Auditor, supra*, “the tax collected is not for the benefit of a municipality alone, but also for that of the state and county.”

Counsel for plaintiffs, in an elaborate and scholarly brief, lay much stress upon the case of *The United States v. Railroad Co.*, 17 Wall., 322, and point out that it is conclusively against the contention of the defendants. That case arose out of an effort on the part of the Federal Government to tax, under the Internal Revenue Act, bonds issued by the city of Baltimore, the proceeds of which were lent to the Baltimore & Ohio Railroad Company. It was held by the Supreme Court of the United States that the Federal Government could not tax the means and instrumentalities employed by a municipal corporation in the performance of its municipal or public duties. The court adverted to the fact that the city of Baltimore was acting as an arm of the state, which might have compelled it, against its assent, to lay the tax and make the appropriation to the railroad

company. Now it is perfectly manifest that the Federal taxing power can not be employed to impede the operations of the state governments, which existed before the Federal government was organized: *Collector v. Day*, 11 Wall., 113; *Pollock v. Farmers Loan & Trust Co.*, 157 U. S., 429; 158 U. S., 601. It therefore logically follows that the same power is impotent to reach the operations of an arm of the state. The state, however, is not thus handicapped in its control over its own municipalities, whose powers it may enlarge, contract or destroy at its pleasure.

There surely can, at this late date, be no denial of the power of the Legislature, in the absence of express constitutional restrictions, to authorize taxation to pay for railroad stock, or for bounties for railroads (*Railway v. Commissioners*, 1 Ohio St., 77; *Cass v. Dillon*, 2 Ohio St., 607; *State v. Trustees*, 8 Ohio St., 394; *Walker v. Cincinnati*, 21 Ohio St., 14; *Perry v. Keene*, 56 N. H., 514; *Sharpless v. Mayor*, 21 Pa., 147; *Gelpcke v. Dubuque*, 1 Wall., 175; *Railroad v. Otoe*, 16 Wall., 667). But it certainly does not follow that the property of the railroad is exempt from taxation merely because of a municipal stock subscription or bounty. The consideration for such exemption would have to move from the other party. *Railway Company v. Trempealeau County*, 93 U. S., 595.

Counsel for plaintiff cite the Fulton Ferry case (*People v. Assessors*, 111 N. Y., 505). That case contains a clear, unequivocal recognition of the distinction to which we have repeatedly referred. The first paragraph of the syllabus reads:

“The property of a municipality, *acquired and held for governmental and public uses*, and used for public purposes, is not a taxable subject within the purview of tax laws, unless specially included.”

The court admits (p. 509) that the Legislature might have made the landing place taxable, but states that it did not do so. It then says:

“We prefer to express no opinion on the question whether there is, in principle, a distinction between taxation of the property of a municipality strictly devoted to public uses, and

1913.]

Railway v. Roth, Treasurer.

property which it owns \* \* \* but the acquisition or holding of which has no essential connection with the public functions of the municipality.”

If the case can be said to support plaintiff's contention, we need only reply that in the case of *Cincinnati v. Hynicka, Treasurer, supra*, it was held by our Supreme Court that not only was municipally owned wharf property taxable, but it was also saleable for delinquent taxes.

Counsel for plaintiffs also cite the case of *Rochester v. Rush*, 80 N. Y., 32, which held that the town of Rush had no authority to tax a portion of the water works of Rochester located within the corporate limits of Rush. That case would undoubtedly be good law in Ohio—largely because Section 5357 of the General Code of Ohio specifically exempts water works properties and fixtures.

The case of *Boston v. Boston, etc., Ry. Co.*, 170 Mass., 95, is also cited; but it is a sufficient answer to say that the facts in that case are so dissimilar to those of the case at bar as to leave it absolutely valueless in the present discussion. It had to do with an attempted special assessment of the land of a railroad lying within its right-of-way, for sidewalks in adjacent streets. The decision was avowedly based upon the law of Massachusetts which exempts the lands of railroad companies lying within their locations, not to exceed five rods in width. No such exemption exists in Ohio, and an absolutely opposite view of the case cited was expressed by our Supreme Court in the case of *Railway Co. v. Connelly*, 10 Ohio St., 159, approved and followed in *Railway Co. v. Belmont County*, 19 Ohio St., 589.

We are thus constrained to arrive at the conclusion that the property described in the petition is not exempt from taxation, because it is not employed in the exercise of any exclusively governmental function and is not within any of the classes of property specifically exempted by statute; and we pass now to a consideration of the second cause of action.

This cause of action is based upon a contention that Section 5399 of the General Code (a part of the so-called Smith One

Per Cent. law, passed May 10, 1910; 101 O. L., 430, 433) forbade the listing for taxation by the County Auditor of any property omitted from the duplicate prior to the year 1911. So far as it is necessary for us to consider this section, it reads as follows:

“If any person required to list property, or make a return thereof for taxation to the assessor or county auditor, or to a board, officer, or person, other than a board composed of officers of more than one county, in the year 1911, or in any year or years thereafter fails to make a return or statement \* \* \* the county auditor for each year as to such property omitted \* \* \* shall ascertain as near as practicable the true amount of personal property, moneys, credit and investments that such person ought to have returned or listed, and the true value at which it should have been taxed in his county for not exceeding the five years next preceding the year in which the inquiries and corrections provided for \* \* \* are made, and not in any event prior to the year 1911. \* \* \* The term ‘personal property’ as used in this section shall apply to all kinds of omitted property for the taxation of which, for any of the years in which it was omitted, provision has not been made by law.”

This section refers in plain words to persons “required to list property,” and its avowed purpose is to bring to light taxable personal property which has been illegally secreted. Now as there is no provision made for the return of municipally owned railroad property, the county auditor is required by the terms of Section 5574 of the code, to place such property upon the duplicate if it has been omitted therefrom.

That the provision of the Code upon which plaintiffs rely has no bearing upon the case at bar is made manifest by the act of May 31, 1911 (102 O. L., 266; General Code, Section 5403-1):

“From and after the passage of this act no county auditor, assessor or other officer shall place upon the tax list or duplicate for taxation as of the year 1910, or as of any year preceding said year, any *personal* property which should have been assessed for taxation as of such year, but which was not returned for taxation therein.” \* \* \*

This act is a part of Chapter 3, Title I, Part II of the General Code, relating to “The Listing of Personal Property,” and was

1913.]

Railway v. Roth, Treasurer.

passed solely to supply a limitation upon Section 5399. It has no bearing upon Section 5574, which is found in Chapter 10 of the same title, relating to "The Assessing of Real Estate."

It must not be assumed that the collection of taxes for previous years, omitted from the duplicate by design or mistake, is necessarily illegal. The Legislature may, unless forbidden or controlled by constitutional provision, authorize a municipality to collect retrospective taxes upon property which, though subject to taxation, was omitted from the assessment roll for any reason whatever: *Dillon, Municipal Corporations*, Section 1400; *Cooley, Taxation*, pp. 492 *et seq.*; *Wilcox v. Eagle*, 81 Mich., 271; *People v. Assessor*, 92 N. Y., 430; *Sanderson v. Herman*, 108 Wis., 662; *Lumber Co. v. McCrimmon*, 164 Fed., 759, 762; *Railway Co. v. Reynolds*, 183 U. S., 471. In the case last cited, Mr. Justice Brewer said:

"It must be remembered that taxes are not debts in the ordinary sense of the term; that they are the enforced proportional contribution of persons and property, levied by the authority of the state for the support of the government, and for all public needs. They are obligations of the highest character, for only as they are discharged is the continued existence of the government possible. They are not canceled and discharged by the failure of duty on the part of any tribunal or officer, legislative or administrative. Payment alone discharges the obligation, and until payment the state may proceed by all proper means to compel the performance of the obligation. No statutes of limitation run against the state, and it is a matter of discretion with it to determine how far into the past it will reach to compel the performance of its obligation."

And so it has been held that an assessment for past years upon omitted property may be made although the property has passed out of the ownership of the person assessed, or out of the assessment district, or even out of existence. *State v. Pors*, 107 Wis., 420.

We therefore conclude that the county auditor did not exceed his authority in placing this property upon the tax duplicate on April 8, 1911.



We come now to the third and last point made by plaintiffs, in their third cause of action. We can not agree with counsel for defendants that by reason of the incorporation in this cause of action of the allegations of the first cause of action, an inconsistency has arisen which is fatal to plaintiffs' claim. The test is whether the allegations of the several portions of the pleading are so far consistent as to make it possible for a person to verify them by oath without swearing falsely (*Glass v. Heffron*, 86 Ohio St., 70, 74). We think that in this case the allegations amount to nothing more than this: "We, the plaintiffs aver that no portion of this property has *in fact* been turned over to the lessees of the Cincinnati Southern Railway; but even if the court should determine that, *as a matter of law*, the property has passed to said lessees under the terms of our lease, then," et cetera. This is not an irreconcilable inconsistency, nor can we accuse plaintiffs of perjury in making the allegations.

The act of May 10, 1910 (101 O. L., 399), creating a tax commission for this state, and investing it with the control of public utilities, was not intended to, and did not in fact, give that commission any control over the property of municipal corporations. Section 71 of the act (101 O. L., 414) provided that:

"This act shall not be construed so as to require any municipal corporation within the state to make any return or pay any taxes under any provision of this act."

To summarize, then, we find that on April 8th, 1911, the property in question was owned by the city of Cincinnati; that it had not yet been turned over to the Cincinnati, New Orleans & Texas Pacific Railway Company, lessee of the Cincinnati Southern Railway; that it was taxable under the laws of Ohio; that it was not subject to the provisions of the act of May 10, 1910, and that the county auditor was not prevented by operation of law from placing it upon the tax duplicate for the year 1910. We are accordingly constrained to sustain the demurrer of defendant to each of the three causes of action, and to dissolve the temporary injunction heretofore granted.



1913.]

Moore v. Village of Elmore.

We confess that we have arrived at this conclusion only with great reluctance. The courts may very properly take judicial notice of the vast importance to the city of Cincinnati of this, the only municipally owned railroad in the world, and we would not lightly do aught to diminish its revenues or circumscribe its operations. But we are endeavoring to interpret the law as we find it, not as we would have urged the makers of the Constitution to make it.

---

**FRANCHISE FOR CONSTRUCTION OF LEASE OF  
WATERWORKS SYSTEM.**

Common Pleas Court of Ottawa County.

JOHN MOORE v. VILLAGE OF ELMORE.

Decided, February 26, 1910.

*Municipal Corporations—Grant to Erect a Water Works System—Bonds Can Not be Sold to Pay Rental Under Lease, When—Statutory Provision for Lease is an Express Grant of Power—Franchise May be Granted to an Individual—Franchise with Lease and Option Privileges Not Invalid as Containing More than One Subject—Failure to Perform Contract Conditions Waived by Counsel Can Not be Enjoined—Sections 3809 and 3939.*

1. The statutory provision for the selling of bonds by a municipality "for erecting or purchasing water works and supplying water to the corporation" is to be read literally, and can not be construed to authorize a sale of bonds to pay rental under a lease of waterworks not yet constructed.
2. The provision of Section 3809 that "any village \* \* \* may contract \* \* \* for the leasing of the water works plant," is an express grant of power to lease such plant.
3. An ordinance for a franchise to construct a water works system in a village may be granted to an individual as well as a corporation.
4. A village prevented by inability so to do, from voting sufficient bonds to construct a water works system may grant a franchise to an individual to construct such a system, and at substantially the same time lease the system for a period of ten years as provided by Section 3809.

5. A franchise for the construction, maintenance and operation of a system of water works, and providing that the village may lease the same and also for an option thereon at the expiration of the period, is not objectionable on the ground of unfitness or uncertainty, and as containing more than one subject, the lease and option features being conditions of the franchise and not subjects of limitation.
6. Failure by a contractor to comply with the conditions of a contract entered into by him with a village, which conditions were waived by council, is not in the absence of fraud or misconduct on their part a cause for injunction against performance of the contract, especially where such failure does not result in prejudice to the community.

*A. F. Allyn and G. W. Keightley, for plaintiff.*

*Scott Stahl, contra.*

REED, J.

Prior to October 19, 1909, the village of Elmore attempted to vote bonds for the purpose of building a waterworks system. The plaintiff in this action commenced an injunction proceeding in this court to enjoin the issuing of the bonds, and upon the petition a temporary restraining order was granted. That case is still pending and undisposed of. In October, 1909, the village of Elmore passed an ordinance granting to J. F. Cole, his successors and assigns, the right to construct, maintain and operate a system of waterworks in the village of Elmore. On November 15, 1909, the village of Elmore passed an ordinance to provide for the execution of a lease of a system of waterworks; the ordinance provided for the leasing of the waterworks which Cole is to construct under the franchise ordinance theretofore passed. This last named ordinance fixes the terms and conditions of the lease, and provides the amount to be paid each year for the use of the waterworks system. On the same day, to-wit, November 15, 1909, the village of Elmore passed an ordinance to issue bonds in the sum of \$2,500 for the purpose of supplying the village of Elmore and the inhabitants thereof with water. These bonds were about to be issued and were advertised for sale when the plaintiff filed this action to enjoin the village from carrying out the provisions and conditions of the lease ordinance, or

1913.]

Moore v. Village of Elmore.

from issuing, selling or disposing of the bonds about to be issued in pursuance of the ordinance of November 15, 1909.

A temporary injunction was issued in this case, and the matter comes up now for hearing upon the application of the defendants to dissolve this injunction.

The plaintiff claims, in the first instance, that the whole proceeding on the part of the defendants is in the nature of a scheme to foist upon the citizens of the village of Elmore a waterworks system without giving them an opportunity to express their desire at an election; that the defendants are acting in fraud of the rights of the citizens of the village of Elmore, and the court ought to interfere to prevent it. Upon the hearing and in the arguments nothing was said about this claim in the petition, and it being well settled as a rule of law that presumptions are all in favor of the good faith of public officials who act, there is nothing in the case from which the court would be justified in drawing the conclusion that there was any fraud in this transaction. On the contrary, I am of the opinion that the public officials in whatever they have done in this matter have acted in the utmost good faith, believing at least they were acting in the interest of the whole people of the community. This seems to me to be a conclusive answer to this contention.

It is claimed on behalf of the plaintiff that the franchise ordinance granting to Cole the right to erect a waterworks system in the village of Elmore and maintain the same is void because there is no authority in law for granting such a right or privilege to an individual; that under the law of Ohio such a franchise or privilege can only be granted to a company or corporation. And in support of this contention it is claimed that the village has no authority except that which is directly given to it by law, and such additional authority as is necessary to carry into effect the express authority granted. This contention of the plaintiff is not tenable because it is not a question of the authority of the village to do a thing; it is rather the construction to be put upon the statute. And construing the statutes so as to give effect to the intention of the Legislature in permitting villages of this character to grant such privileges,

it seems to me that the language is broad enough to authorize the granting of such a franchise as was granted by the village of Elmore to an individual; and, having reached that conclusion, it seems to me clear that the franchise can not be declared void on this account. In other words, it being the intention of the Legislature to permit villages to grant these franchises or privileges, there can be no reason why it could not grant such a privilege to an individual as well as to a company or corporation. And, having reached the conclusion it was the intention of the Legislature to so provide, the court will read into the statute the word "individual" and thus give effect to the intention of the Legislature.

It appears from the pleadings and the testimony upon the hearing that the waterworks provided for in the franchise granted to Cole has not as yet been constructed, and, as has been said, the whole thing is on paper. And the plaintiff asserts that the lease ordinance is void because the authority, if there is any authority, to make a lease of a waterworks plant, presupposes the existence of such a plant, and there must be in existence a waterworks plant before the village is authorized to enact an ordinance leasing the same; and some authorities have been cited in support of this claim. I do not know of any reason in law, or in good morals, that would prevent the village from entering into such an arrangement as has been made in this case. If the village is prevented by reason of its inability to vote sufficient bonds to construct a waterworks system, why may it not agree with Cole in advance that if he will construct a waterworks system the village will lease the same for a period of ten years? These laws are enacted for the protection of the taxpayers, and to prevent fraud, and I can not see wherein the rights of the public will be greatly prejudiced, or prejudiced at all, by permitting such arrangement as has been made in this case. It is quite fair to presume that the citizens of the village of Elmore are desirous of having a waterworks system if the same can be procured according to law. In fact, a waterworks system is almost indispensable to any community the size of the village of Elmore. The citizens speak through the officers of a

1913.]

Moore v. Village of Elmore.

village, and the council have taken action in the matter, and the court is bound to assume that its action represents the will of the people. And I am inclined to the opinion that there is nothing in the claim that would prevent the village from entering into an arrangement like the one at bar; that is, from granting a franchise and at substantially the same time entering into a lease ordinance.

The plaintiff further asserts that the franchise ordinance is void because it is indefinite and uncertain, and contains more than one subject which is not expressly stated in the title. I have examined the authorities submitted in support of this contention, and am of the opinion that the claim is not well founded. The franchise ordinance authorizes the construction, maintenance and operation of a system of waterworks, and it provides that the village may lease the same, and also for an option at the expiration of a period of years. If the claim of the plaintiff is well taken, then a city or village could never protect itself by providing for a lease, or providing for an option, because if it gave a straight franchise without these provisions it would have to depend upon the will of the party to whom the franchise was granted, or its successors and assigns, whether an option should be granted or a lease ordinance entered into. These things are not new subjects. They are conditions of the franchise, and not new subjects of legislation. In other words, the franchise is a franchise to Cole permitting him to construct and maintain a system of waterworks in the village of Elmore, and lay mains in the streets, etc., conditionally. I know of no rule of law or decisions that would prevent the council of the village from asserting its rights in case it should in the future desire to take over the property, either by lease or by purchase.

It is also set forth that J. F. Cole has in numerous ways failed to comply with the conditions of the ordinance on his part to be performed. These are matters in my opinion that may be properly waived by the village council; and in the absence of fraud or misconduct on the part of the public officials, a court of equity will not enjoin the carrying out of a contract such as the one under consideration. Before a court of equity

will interfere with the acts of the officers of a municipality, such as the village of Elmore, it must appear clearly and convincingly that it is necessary for the court to do so to protect the community from a manifest injury; and where it appears that the council are exercising an honest judgment and acting in good faith, even though it may be waiving some rights which it may enforce, if it desires to do so, a court of equity will not enjoin, especially in the absence of evidence that such act will result prejudicially to the community. The things of which the plaintiff complains as not having been complied with by Cole are unimportant matters that the village may at any time exact and fully protect its rights.

Section 1536-205, R. S. (General Code, 3809) further claimed that the village had no authority to lease a waterworks system.

“That the council of any village may make a contract with any person, firm or company, for the leasing of the waterworks plant of any person, firm or company therein situated for a period not exceeding ten years,” does not directly authorize such lease to be made, but is intended merely to provide that in case such lease is made, the certificate that the money is in the treasury does not need to be on file; that this statute should be read altogether, and is intended merely as a restriction upon the right of a municipal corporation to contract obligations, and that this language is merely an exception and not an express grant of power. If this is not an express grant of power to lease a waterworks system, there is none to be found in the statute. The language is plain and unambiguous. It authorizes cities or villages to lease waterworks systems. It can not be said that it creates an obligation to be paid by the taxpayers because it may be presumed that careful and conservative management will make it more than self-sustaining. Who can say at this time that if this waterworks system is built and the village takes it over and manages it properly, it will not be self-sustaining? And it may produce a source of income to the village beyond any obligation that the village by and through this lease ordinance assumes or undertakes to pay. This is an answer to the claim that before this sort of an arrangement can be made

1913.]

Moore v. Village of Elmore.

it must be submitted to a vote of the people. This does not conflict with Section 3981, General Code, which provides that the city council may contract for a water supply, but that before entering into such contract the proposition must be submitted to a vote of the inhabitants, because in such a case there is an obligation to be made. There is no limit during which such contract shall exist, and the Legislature has seen fit to make this distinction, that where the municipality leases the waterworks system and undertakes to operate it, it may do so for ten years without submitting it to a vote of the inhabitants of the municipality; but if the municipality undertakes to contract for water for a period of time, it must submit it to a vote. It may be urged that there is no reason for the distinction. The court has nothing to do with this. It is sufficient to say that the Legislature has made the distinction, and therefore the court must be guided by the law as it finds it and not be influenced by the fact that the Legislature may have protected the public in one regard and failed to provide the same safeguards for the public if the same thing is done in some other way. It may be said, and undoubtedly is true, that the Legislature considered that if the municipality had the charge and control of the system of waterworks, received the rents, profits and income therefrom, it could protect itself. And again, it may be said that the Legislature intends to encourage as much as possible any municipality in owning and operating its public utilities. And while this limit in time is the nature of public ownership for a period of time, whether it be true or false, it is generally supposed that a municipality can furnish to its inhabitants light, heat and water at a less expense and render better service than can a private corporation that may under our present law over-capitalize and over-bond its property, and thus create a condition that necessitates exorbitant charges to meet fixed demands. I have briefly stated my reasons for the conclusion which I have reached as to the franchise ordinance and the lease ordinance, and this brings me to the question of the bond issue. The only authority that the village has to issue bonds is that granted by the Legislature. The defendant contends it is authorized under paragraph



11 of Section 2835 (General Code, 3939), to issue these bonds. This paragraph reads as follows:

“For erecting or purchasing waterworks and supplying water to the township, or corporation, and the inhabitants thereof.”

The defendant contends it has a right to issue bonds under this subdivision if the statute for the erection or purchase of waterworks, or for supplying water to the inhabitants of the community; that the word “and” should be taken out of the statute and in its place the word “or” should be inserted. That is, that the court should read the word “or” in the statute in the place of “and.” In a matter of so much importance as the issuing of bonds which become a charge against the community, the law must be strictly construed, and the power of the municipality must be limited absolutely to that granted to it by the Legislature. This statute should be read literally. The court can not read anything into it or change its plain meaning. Giving it that construction which the court is required to give it, the only authority the village has to issue bonds is for the erection or purchase of waterworks for the purpose of supplying the inhabitants with water. The bonds in question are not being issued for the purpose of erecting or purchasing a system of waterworks. On the contrary the purpose is to use the money to pay a rental under a lease. Therefore, the village not being authorized to issue these bonds, its act is void.

I might add, however, in this connection that even if this statute could be construed so as to permit these bonds to be issued under proper conditions, I doubt very much the advisability of this bond issue at this time. Mr. Cole has not yet complied with his contract. There is no system of waterworks in existence in the village of Elmore, and it will be time enough to incur obligations when there is a necessity for it. It is not my purpose to advise the village council of Elmore as to the manner in which it should conduct its affairs, but it might not be out of place at this time to suggest that good faith would require some action on the part of Mr. Cole indicating an intention to carry out his part of the contract before the tax-payers of the village of Elmore are burdened with a bond issue.



1913.]

Weingerter v. Railway.

A decree will, therefore, be entered in favor of the plaintiff to the extent that the defendant will be enjoined from issuing or selling the bonds. In all other respects the decree will be in favor of the defendant and the defendant will be taxed with the costs. Exceptions may be noted, and bond fixed at \$100.

I neglected to speak of the effect of the previous bond issue and the pending injunction suit. It seems to me the village can abandon that proceeding at any time and by granting a franchise to Mr. Cole and enacting the lease ordinance, I am of the opinion it has in effect done so.

---

**PROXIMATE CAUSE OF COLLISION BETWEEN AUTOMOBILE  
AND INTERURBAN CAR.**

Common Pleas Court of Hamilton County.

HARRY WEINGERTER V. THE OHIO ELECTRIC RAILWAY COMPANY.

Decided, February 1, 1913.

*Negligence—Injury to Driver of Automobile in Collision with Interurban Car—Blowing of Warning Whistle Does Not Necessarily Relieve Railway Company from Liability—Question of Proximate Cause One for the Jury.*

In an action for damages on account of injuries, resulting from plaintiff driving an automobile onto the track of an interurban road in front of an approaching car by which he was struck, the fact that the motorman blew his whistle when one thousand feet from the crossing is not of itself sufficient to warrant the arrest of the case from the jury, but the case should be submitted to the jury to determine whether the negligence of the defendant was, in view of all the conditions and circumstances, the proximate cause of the injury.

*Joseph B. Kelley, for plaintiff.*

*Paxton, Warrington & Seasongood, contra.*

WOODMANSEE, J.

This is an action brought for the recovery of damages for an injury growing out of plaintiff driving an automobile upon the

track of the defendant company. The plaintiff lost a foot and was otherwise seriously injured. At the conclusion of plaintiff's evidence counsel for defendant moved that the case be arrested from the jury, which was overruled by the court. On the submission of the entire evidence in the case, the motion was renewed and was granted. A new trial is now sought because the case was taken from the jury.

In granting the motion the court followed strictly the decision of the circuit court of this district in the case of *The N. & W. Ry. Co. v. Stella Beck*, 14 C.C.(N.S.), 491. During the pendency of this motion the Supreme Court of this state, on November 26th, 1912, in the case of *Steubenville & Wheeling Traction Co. v. Brandon, Admr.*, to be reported in 87 Ohio St., has handed down a most important decision, which has a vital bearing upon the issue involved in this case.

It is undoubtedly the law in this state that a person driving on the highway, before crossing a steam railway track, must look and listen for an approaching train, and he must do both if necessary. If the hearing is interfered with, then it becomes all the more necessary to look—and if neither is effective, if a car approaching near to the crossing can not be seen because of some obstruction, or can not be heard because of defective hearing or other noises—then ordinary care would require that the traveler upon the highway should stop and investigate before crossing the track.

It would seem that the same law should govern as to crossings over interurban electric railway tracks where the speed is almost as great as on steam railroads, but if the interurban companies want the benefit of the law governing steam railway crossings, they must be charged even more strictly with the duties resting upon the former companies relative to grade crossings. The steam railroad track is necessarily almost level, while the electric track climbs and descends the hillsides through the country, with but comparatively little change in the natural grade. This in itself often obstructs the view of an approaching car, and thereby imposes an added duty on the interurban company to give emphatic notice of an approaching car toward a highway crossing.

1913.]

Weingarter v. Railway.

In the case at bar the evidence disclosed that the motorman did what he always did at the crossing in question, namely, blew the whistle one thousand feet away. Having done this the defendant company insists that it has done its full duty. The evidence also disclosed that from the point where the whistle blew the car made quite a descent, then climbed a steep grade, and passing along a cut upon the side from which the plaintiff was approaching, which partly obstructed the view of the car. The speed was ordinary—about twenty-five miles an hour.

Plaintiff testified that he looked and did not see the approaching car; that he listened and did not hear it, and that he stopped in order that he might hear a car should it be approaching nearby. Being in an automobile it may be that the noise of his engine made it impossible for him to hear the sound of a moving electric car, and the vision was partially obstructed.

While it seems almost incredible to the court (who has examined the crossing in question since the trial) that the plaintiff could not have seen the car if he had looked, yet the court is impressed with the fact that this dreadful accident would likely never have happened if the defendant had exercised ordinary care in taking even slight precaution of sounding a gong or ringing a bell at the near approach to the crossing. Ordinary care would not require such precaution at all crossings, but particularly at a crossing such as the one in question where the view is partially obstructed and the sound of a moving car may be deflected by the ascending grade.

In the case of *Schwemfurth, Admr., v. Railway Co.*, 60 Ohio St., 223, the court say :

“The question whether defendant was negligent with respect to driving upon the track was one of the questions of fact for the determination of the jury upon the evidence.

“If upon the whole evidence contributory negligence such as would defeat a recovery be not shown by a preponderance of the evidence and the negligence of the defendant be so shown, the action may be maintained.”

After a most thorough review of this case, and upon the examination of the recent decision of our Supreme Court referred

to herein, this court is of the opinion that the evidence in this case should be submitted to a jury to determine whether the negligence of the plaintiff or the negligence of the defendant was the proximate cause of the injury complained of.

The motion for a new trial should be granted.

---

**DESCENT OF REALTY IN WIFE'S NAME.**

Common Pleas Court of Hamilton County.

CHARLES F. WRIGHT ET AL V. EDWARD S. PEASLEE,  
EXECUTOR, ET AL.

Decided, January 27, 1913.

*Descent and Distribution—Husband Inherits Property Purchased by  
Wife—With Money Given Her by Her Parents—Section 8573.*

Where a wife takes title in her own name to property purchased for a home with funds given her by her parents for that purpose, and dies intestate and without issue, the property will be treated as having come to her by purchase rather than from an ancestor, and title thereto passes to her husband and his heirs and devisees under the rule that the descent of real estate is controlled by the legal title.

*Scott Bonham*, for plaintiffs in error.

*John E. Fitzpatrick*, contra.

GORMAN, J.

This proceeding is one on error from a judgment of the Probate Court of Hamilton County. The action in the probate court was brought by Edward S. Peaslee, executor of the last will and testament of John B. Peaslee, deceased, against Charles F. Wright et al, being all the heirs and next of kin of John B. Peaslee, deceased, and also the heirs and next of kin of his deceased wife, Lou W. Peaslee (nee Wright).

The petition in that court was one to sell real estate to pay debts of John B. Peaslee, deceased. The real estate was described therein, and among other things it was recited that the premises were the same that were conveyed to Lou W. Peaslee,

1913.]

Wright v. Peaslee.

wife of John B. Peaslee, by Augustus G. Bofinger and Lewis G. Hopkins, by deed dated June 19, 1893.

The defendants, Charles F. Wright and J. Gano Wright, filed an answer in the probate court setting up that they were the brothers and only heirs at law of Lou W. Peaslee, deceased, formerly the wife of John B. Peaslee, also deceased, and that John B. Peaslee and his wife, Lou W. Peaslee, died without leaving any issue surviving them or either of them. They further set up that the property described in the petition of the plaintiff was owned by said Lou W. Peaslee during her lifetime and up until her decease, and that said property or real estate was purchased by her in about the year 1892 during the time of her marriage with said John B. Peaslee; and they further aver that the consideration paid for said property to the extent of \$3,500 was paid by her from funds furnished to her by her father, Joseph F. Wright, and other funds furnished to her by her mother, Mary G. Wright, also the mother of these defendants, and from other funds derived by her from other ancestors of hers and these defendants. The petition avers that Lou W. Peaslee was the owner in fee simple of the real estate described in the petition and died intestate without issue, leaving as her sole heir at law and sole devisee under her will, John B. Peaslee. The said John B. Peaslee died testate without issue, having devised said real estate which came to him from his deceased wife, to Marshall Peaslee, Reuben Peaslee, Daniel M. Peaslee and other next of kin of John B. Peaslee.

The answer of the next of kin of Mrs. Peaslee in the probate court further set up that by reason of the fact that the funds which purchased this real estate came to Mrs. Peaslee by gift from her ancestors to the extent of \$3,500, that therefore John B. Peaslee held only a life estate in the real estate so owned by his wife, and that he had no title to said real estate except a life estate therein, and that at his death the real estate passed as ancestral property to the extent of \$3,500, to the heirs and next of kin of Lou W. Peaslee, the wife of John B. Peaslee. In brief, the heirs and next of kin of Mrs. Peaslee claim that this real estate to the extent of the amount of money

invested therein by Mrs. Peaslee, which came to her from her father and other relatives, was ancestral property under Section 8573 of the General Code. This is the section applicable to the descent of ancestral real estate. It is claimed by the Wright's that this real estate in the hands of Mrs. Peaslee at the time of her death was ancestral property to the extent of \$3,500, and that therefore Mr. Peaslee had but a life estate in \$3,500 of the property.

We are of the opinion that all the questions involved in this case are conclusively settled adversely to the claim of the plaintiffs in error by the cases of *Patterson v. Lampson*, 45 Ohio St., 77, and *Russell v. Bruer*, 64 Ohio St., 1. The course of descent of real estate is controlled by the legal title. Mrs. Peaslee held the legal title to this property. It is immaterial from what source the moneys came with which she purchased the property. The title to this real estate did not come to her from an ancestor, but came to her by purchase from Bofinger & Hopkins.

Upon the authority of these two cases and upon the construction of the statutes, as well as on reason, the court is of the opinion that the judgment of the probate court in sustaining the demurrer to the answer of the plaintiffs in error and holding that they have no right, title or interest in the real estate sought to be sold in the probate court, was a correct conclusion and sound law.

The judgment of the probate court is therefore affirmed at the costs of the plaintiffs in error.

1913.]

State v. Gunkelman.

**CONSTRUCTION OF STATUTE RELATING TO EMBEZZLEMENT  
OF PUBLIC FUNDS.**

Common Pleas Court of Medina County.

STATE OF OHIO V. CHARLES H. GUNKELMAN. \*

Decided, 1911.

*Criminal Law—Construction of Section 12873—Relating to Embezzlement by Public Officials—Mere Use of Public Funds Not a Crime.*

The use of public funds by the official in whose custody they are placed by law does not constitute an offense, unless there is a defalcation on the part of such official; and where the testimony discloses that all funds so used by the defendant official have been returned, and there is no defalcation as to any part thereof, a motion will be granted to instruct a verdict for the defendant.

*Arthur Van Epp.*, Prosecuting Attorney, for the state.*Frank Heath*, contra.

STROUP, J. (orally).

We will take up for decision the second paragraph of the motion made by the defendant to direct a verdict, which is that all the evidence introduced by the state does not show the commission of any offense by this defendant, under the laws of the state; and the state has failed to make out a case against the defendant, etc.

Every crime in Ohio is defined by statute. I will go over some decisions, briefly, as to how the courts are to construe statutory crime:

“A criminal statute is to be strictly construed, and its language is not to be extended beyond its fair interpretation, to the prejudice of the accused.” *Smith v. State*, 1 C.C.(N.S.), 493.

---

\* Exceptions to the ruling in this case were overruled by the Supreme Court November 26, 1912.

Again:

“Penal statutes are to be construed strictly, and can not be extended, by implication, to cases not falling within their terms.” *Hall v. State*, 20 O. R., 8.

Again:

“Where an act is made punishable by fine and imprisonment, the words in which the offense is defined and punishment prescribed must be strictly construed, whether they are found in a statute, or an ordinance or by-law.” *Schultz v. Cambridge*, 38 Ohio St., 659.

And in a recent case:

“It is a familiar and fundamental rule of interpretation which requires that in the construction of a statute or constitution, meaning must, if possible, be given to every part and word.” *State v. Durflinger*, 73 Ohio St., 154, at 159.

Section 10214 of the General Code is a statute not often referred to, but it is in force in Ohio. These words are used:

“The provisions of part third and all proceedings under it, shall be liberally construed, in order to promote its object, and assist the parties in obtaining justice.”

This is with reference to remedies, I suppose, and procedure. Further quoting:

“The rule of the common law, that statutes in derogation thereof must be strictly construed has no application to such part.”

Particularly applicable at this time is this provision:

“But this section shall not be so construed as to require a liberal construction of provisions affecting personal liberty, relating to amercement, or of a penal nature.”

This same statute was cited and commented upon in the case of *State v. Gibbs et al*, 7 N.P.(N.S.), 345, at 360, and the court of Huron county, I think, said this, in reference to this statute, that:



1913.]

State v. Gunkelman.

“The rule of strict construction in criminal matters is jealously guarded.”

And again, a more recent case:

“The object of judicial investigation in the construction of a statute is to ascertain and give effect to the intent of the law-making body which enacted it.” 81 Ohio St., 171, at 178.

The intention of the law-makers is to be—

“Collected from the causes of the law, its scope, its object, its language, its purposes expressed in its title and context and the manifest incentive for their enactment as evidenced by the circumstances attending its passage, all harmonizing.” *State v. Gibbs et al*, 7 N.P.(N.S.), 345, on page 355.

In the case of *State v. Meyers*, 56 Ohio St., 350, the Supreme Court of this state uses these words: •

“And, under that fundamental rule of strict construction applicable to all penal laws, a statute defining a crime can not be extended by construction to persons or things not within its descriptive terms, though they may appear to be within the reason and spirit of the statute. Persons can not be made subject to such statute by implication.”

The words that I now read, it seems to me are of great importance:

“Only those transactions are included in them which are within both their spirit and letter; and all doubts in the interpretation of such statutes are to be resolved in favor of the accused.”

Now, that being the law which must govern this court, let us take up the statutes, or the statute under which the defendant in this case is indicted. Section 12873 is what is called the “public officer embezzlement statute.” It provides that:

“Whoever, being charged with the collection, receipt, safe-keeping, etc., of public money \* \* \* who converts it to his own use, etc., shall be guilty of embezzlement of the money or other property thus converted \* \* \* and shall be im-

prisoned in the penitentiary not less than one year nor more than twenty-one years, and (not or) fined double the amount of money or other property embezzled.”

The next section provides that this fine shall “operate as a judgment at law \* \* \* and be enforced to collection \* \* \* for the use only of the owner of the property or effects so embezzled.”

Referring now to Section 13674. This statute provides that failure or refusal to pay over public money—I am not quoting the exact words—or part thereof, or to account to, or make settlement with a legal authority, shall be *prima facie* evidence of the embezzlement thereof.

Now, what do these statutes mean? It will be noticed that the section I first quoted, 12873, provides that when a party pleads guilty, or is found guilty, the court must not only sentence him to the penitentiary for a period not less than one year nor more than twenty-one years, but the court must furthermore—and it is as imperative in one as in the other—fine him double the amount of the money embezzled.

Another statute which, while it was in force, was analogous to this, was the old statute which provided that when one sells liquor to a minor, he should be fined and imprisoned. The courts were called upon in cases under that statute not only to fine the defendant, but also to imprison the defendant. I think that law has since been changed, and the word, “or,” has been used in the place of “and.”

Now, the 56 Ohio State case, to which I have referred, is a case where one Meyers was indicted as a deputy auditor, for embezzlement under this section of the statute. Judge Williams, in construing Section 12873, G. C., or Section 6841 of the Revised Statutes, uses these words, at page 345:

“The question raised by the demurrers, and presented by the exceptions, is whether this section applies to a deputy county treasurer who misappropriates the public moneys in either of the modes forbidden by the section. In the determination of the question, other statutory provisions may properly be considered, especially those of Section 7299”—that is the present *prima facie*

1913.]

State v. Gunkelman.

statute, only the number is different—"which, with the provisions of Section 6841,"—the public officer embezzlement statute—"were originally enacted in what is known as the independent treasury act, passed in 1858, and together constituted but one section (Section 15) of that act. The section was divided in the codification of the statutes, and the parts assigned to their appropriate places, as they now appear in the criminal code, without material alteration; the one being placed in the chapter in which crimes and offenses are defined, and the other in that regulating criminal procedure. The latter, now Section 7299, reads as follows," etc.

At page 346, Judge Williams says:

"It will be noticed that by its terms, Section 6841 is restricted in its application, to persons who are 'charged with the collection,' " etc.

Later on, he says:

"And the limitation is carried through Section 7299, which declares that any failure or refusal to pay over, or to produce the public money, etc., shall make a *prima facie* case of embezzlement."

And at page 347, he says:

"From these provisions, it seems reasonably certain that the persons who are subject to prosecution under Section 6841, are those only, who are charged by law with the performance of the duties, or some of them, therein mentioned," etc.

I refer to this, only, as showing that in construing one, the Supreme Court looks as well to the other.

And again, on page 348, the court says:

"And the application of both Sections 6841 and 7299, to such officers and persons, is clear and indisputable."

It can be seen upon reading Section 12873, it clearly was not the intention of the Legislature, where money has been paid back into the township treasury, and the public is not loser, that a defendant shall be imprisoned in the penitentiary and also fined double the amount of the money. So, then, we have to look

to the rules of law which I have mentioned, to ascertain the intent of the law-making body at the time these sections were enacted.

We know it was the common experience of treasurers, up to within a recent time, to take money which they had in their custody, public money, and use it in their business. They thought they had a right to do it; they had given a bond to the public officers. They thought they had not only a right to use the money, but up to within recently they thought that they had a right to the interest on that money, as long as their bond was given, which they regarded as safe-guarding the rights of the public, in obligating them to make their settlement and turn the money over; and so far as the public was concerned, they were not interested further; the public was only interested in finally knowing and feeling that the public money was forthcoming, when a settlement was made, and the official books presented and they showed that fact.

It was when the situation was as I have described, that the law as to the embezzlement of public officers was enacted.

Now, it is not the province of the court to enact the law. The court is only called upon to construe the law in cases of this nature.

In construing this statute, 12873, G. C., according to the rules by which it is to be construed, and considering the other section of the statute, 13674, G. C., which was enacted at the same time, it seems to me one can come to the conclusion only that the intention of the law-making body at the time the same was enacted, was to provide for a crime only where a treasurer converted the money to his own use and defaulted. If such was not the intention, the statute, when it prescribes the punishment, would read in substance, "shall be imprisoned in the penitentiary, and in case the money is not forthcoming, or there is a defalcation, the defendant shall be fined double the amount of the property embezzled," but in a case where there was no defalcation, the punishment would merely be imprisonment in the penitentiary.

Motion to direct a verdict for the defendant sustained.

1913.]

State v. Railway.

**RAILWAY COMPANIES WHOSE PROPERTY IS UNDER LEASE  
SUBJECT TO WILLIS LAW TAX.**

Common Pleas Court of Cuyahoga County.

THE STATE OF OHIO V. THE CLEVELAND & PITTSBURG RAILROAD  
COMPANY.

Decided, February 1, 1913.

*Taxation—Ohio Railways Under Lease—Liable for Payment of Willis  
Law Franchise Fees—Tenant Company Not Agent of the Owning  
Company—Why Certain Classes of Corporations Are Exempt From  
this Tax—Meaning of the Phrase "Engaged in Business"—Sections  
5485 et seq.*

A railroad company, incorporated in this state and owning a line of railway which is being operated by another company under a long lease, is not relieved by reason of such lease from payment of the annual franchise fees provided by the Willis law, where it continues to maintain its corporate organization, collect rents, pay dividends, and to issue stock and bonds from time to time for extensions, betterments and refunding purposes.

*Timothy Hogan*, Attorney-General, *C. D. Laylin* and *Robert M. Morgan*, for plaintiff.

*Sanders & Dempsey*, contra.

LAWRENCE, J.

This action has been brought by the state of Ohio, plaintiff, at the request of the Secretary of State, against the Cleveland & Pittsburg Railroad Company, defendant, to recover from said company a fee of one-tenth of one per cent. upon the outstanding capital stock of said company for the years 1902 to 1907, inclusive, under Section 1 of the act of the General Assembly entitled "An act to require corporations to file annual reports with the Secretary of State and to pay annual fees therefor," passed April 11, 1902 (95 O. L., 124), commonly known as the Willis law, and an act amendatory thereof approved April 25, 1904 (97 O. L., 381).

The defendant is a steam railroad corporation, incorporated in this state prior to the adoption of the Constitution of 1851, but it has become subject to the provisions of that Constitution by various acts done by it before the year 1901. Said corporation owns a line of railroad in this state, which was constructed by it and which it operated prior to December 1, 1871. On October 25, 1871, by a lease to take effect December 1, 1871, it leased to the Pennsylvania Railroad Company, for the term of 999 years, all of its railroad property, together with all rights, privileges and franchises connected with or relating to the said railroad or to the construction, maintenance, use or operation of the same, but not including the franchise to be a corporation or any other right, privilege or franchise which is or may be necessary to preserve its corporate existence or organization. During the years involved here the defendant operated no railroad having surrendered to the lessee possession of its railroad and equipment, and such lessee, or its assignee, the Pennsylvania Company, has since 1871 operated and possessed the same.

The defendant, however, has continued to maintain its corporate organization, collecting rent under said lease, issuing new stocks and bonds from time to time to pay for extensions, renewals, betterments and increased facilities of its railroad properties and for refunding purposes, holding stockholders' meetings, and paying dividends, all as provided in said lease.

For the years in question here, the Pennsylvania Company made reports to the Auditor of State of the gross earnings from the operation of the railroad so leased by the defendant under the act of the General Assembly originally passed March 19, 1896 (92 O. L., 79), known as the Cole law, and the subsequent amendments thereto.

The state of Ohio contends that the defendant company is liable to pay the franchise tax under the act known as the Willis law, as provided in Section 1 of said act, while the defendant claims that said section should be construed as applying only to corporations doing business in this state, and that the defendant was not engaged in business in that it was not operating any railroad. The defendant further contends that it falls

1913.]

State v. Railway.

within the class of corporations specifically exempt under Section 7 of said act.

Many of the rules relating to the construction of statutes have been called to the attention of the court by counsel, but as these rules, for the most part at least, are such as are used only in case of ambiguity in statutes, it may be well, before resorting to them, to inquire whether there is any ambiguity in the language of the statute under consideration. *Hough v. Dayton Manufacturing Company*, 66 O. S., 427.

Section 1 of this statute is as follows:

“Every corporation organized under the laws of this state, for profit, shall make a report in writing to the secretary of state, annually, during the month of May, in such form as the secretary of state may prescribe, containing the following facts:

“1. The name of the corporation.

“2. The location of its principal office.

“3. The name of the president, secretary, treasurer and members of the board of directors, with post office address of each.

“4. The date of the annual election of officers of such corporation.

“5. The amount of authorized capital stock and the par value of each share.

“6. The amount of capital stock subscribed, the amount of capital stock issued and outstanding, and the amount of capital stock paid up.

“7. The nature and kind of business in which the company is engaged and its place or places of business.

“8. The change or changes, if any, in the above particulars made since the last annual report.

“Such report shall be signed and sworn to before an officer duly authorized to administer oaths, by the president, vice president, secretary, or general manager of the corporation, and forwarded to the secretary of state.

“Upon the filing of such report, the secretary of state shall charge and collect from such corporation a fee of one-tenth of one per cent. upon the subscribed or issued and outstanding capital stock of said corporation, and to be not less than ten dollars in any case.”

It will be observed that in specification 7 of said section relating to the facts to be stated in such report, the company reporting is required to state the nature and kind of business in

which it is engaged, and its place or places of business; but it seems to me that no inference can be drawn from this that the tax is payable only by corporations engaged in business. If we look further it will be seen that a company, in its report, is required to state various other matters such as the location of its principal office, the names and addresses of its officers, and the date of the annual election of officers, which have nothing to do with the basis on which the amount of the fee is determined. Plainly these matters are for the purpose of giving information proper to be had by the Secretary of State, and they are not intended as limitations upon the express provision that every corporation organized under the laws of this state, for profit, shall make a report to the Secretary of State, and that upon the filing of such report the Secretary of State shall charge and collect from such corporation a fee of one-tenth of one per cent. upon its subscribed or issued and outstanding capital stock. If a corporation be engaged in no business, it would be sufficient compliance to so state in the report. In the present case, however, I think that the defendant is engaged in business to such extent as to enable it to state the nature and kind of business in which it is engaged, and its place or places of business. If we had a statute which, by its terms, imposed a tax only on companies engaged in carrying on business, possibly a different question might be presented.

The fact that under Section 2 of the statute, relating to foreign corporations, the amount of the fee is based upon the proportion of the authorized capital stock of the corporation represented by property owned and used and business transacted in Ohio, does not seem to be of weight in ascertaining the meaning of the provision in Section 1 respecting the fee to be paid by domestic corporations, it being apparent that two entirely distinct and different methods are provided in the respective cases, and it being also clear that the reference to the proportion of the authorized capital stock represented as stated is merely the method employed to determine the just amount to be imposed upon a foreign corporation for the privilege of exercising its franchises in this state.



1913.]

State v. Railway.

It is true that in the case of *Southern Gum Company v. Laylin*, 66 O. S., 578, in which the Supreme Court held this act of April 11, 1902, to be constitutional, the 5th paragraph of the syllabus is as follows:

“A franchise tax may be imposed by the General Assembly upon corporations, both domestic and foreign, doing business in this state.”

What the court meant by the use of this language is more clearly indicated in the opinion, on page 595, where it is said:

“A domestic corporation is given life and continued existence by the state, and this life and existence with their accompanying powers constitute the franchise, and this franchise being valuable and given by the state, the state may impose a franchise tax thereon to the amount of the value thus conferred and continued, the same as in taxation by assessment; the public first bestows a special benefit upon the property, and then takes back by way of assessment a part or all it has thus conferred (*Walsh v. Barron*, 61 O. S., 15). A foreign corporation can do business in this state only upon such terms and conditions as the state may impose, and therefore a franchise tax may be imposed upon a foreign corporation for the privilege of doing business in this state. It therefore follows that a franchise tax may be imposed on both domestic and foreign corporations alike.”

Really what the court held in that case was, that the tax under the Willis law was a franchise tax, and not a tax upon property, and hence was not subject to the constitutional limitations respecting the taxation of property. It would be equally a franchise tax, whether assessed upon all domestic corporations or only upon those engaged in active business, and the court was not called upon to definitely distinguish between the several classes of corporations taxed. A fair consideration, both of the reason of the decision and of the entire language used, is convincing that it was not intended to restrict the application of Section 1 to such domestic corporations as were engaged in business.

In my opinion the language of Section 1 admits of no construction other than that it applies to every corporation organ-

ized under the laws of this state, for profit, whether it is actually engaged in business or not, unless such corporation falls within one of the classes of corporations excepted by virtue of Section 7 of said act.

Section 7 of the original act passed April 11, 1902 (95 O. L., 124), contains this language:

“Provided that electric light, gas, natural gas, water works, pipe line, street railroad, electric interurban railroad, steam railroad, messenger, union depot, express, freight line, sleeping car, telegraph, telephone and other corporations, required by law to file annual reports with the Auditor of State, and insurance, fraternal, beneficial, building and loan, bond investment, and other corporations required by law to file annual reports with the superintendent of insurance, shall not be subject to the provisions of the preceding sections of this act.”

By the act of April 25, 1904 (97 O. L., 381), this section was amended by inserting the words “public service” before the word “corporation” where it first appears, and the comma following the word “corporations” is left out. I am unable to see, however, in what way this amendment changes the meaning of the original section. The insertion or the omission of this comma seems to be accidental, for in the two similar clauses in the original section it was inserted in one and omitted from the other. Indeed, the usage as to commas is so varied, that there is no reason why significance should be given either to the use or the omission of one in a clause like this.

In the interpretation of the language in Section 7, counsel on both sides invoke the grammatical rule by which, where there are two or more words or phrases in a clause, each capable of being an antecedent, relative and qualifying words, phrases and clauses following the same are to be applied to the last antecedent. Generally, this is a rule of statutory construction, unless an extension to and inclusion of other antecedents more remote are required by a consideration of the entire statute. An antecedent, however, is not necessarily a single word; it may be qualified by words preceding it, as well as by those which follow it. Here we have only one substantive preceding the clause, “required by law to file annual reports with the Auditor of

1913.]

State v. Railway.

State," which is the word "corporation"; but this substantive is modified by all of the adjective words preceding it. Plainly the words "electric light, gas, natural gas, water works, pipe line, street railroad, electric interurban railroad, steam railroad, messenger, union depot, express, freight line, sleeping car, telegraph, telephone" are adjectives and not nouns, and plainly, as it seems to me, they each qualify the word "corporations" just as much as does the word "other."

The suggestion has been made that if the General Assembly intended, by the first clause of this proviso, to exempt all corporations required to file reports with the Auditor of State and none others, it could easily have said so without enumerating any of them. This is true, but it is not the course which that body generally follows, as may be seen by opening a volume of the statutes, almost at random.

The reason why the General Assembly, under Section 7, exempted from the operation of the Willis law, certain public service corporations and not all of them, is apparent from an examination of the statutes which require reports to be filed with the Auditor of State or with the superintendent of insurance, as the case may be. It will be found that those corporations which are thus required to file reports are subject to the payment of excise taxes or other taxes or charges, to which corporations generally are not subject. Being already subject to burdens other than taxes upon property, there seems to be good reason for exempting them from the Willis law, but no reason is apparent for extending such exemption to other corporations.

It is said, however, that at the time of the passage of the Willis law, union depot, telegraph and telephone companies were not required to pay excise taxes. This is literally true, but telegraph and telephone companies were required to pay taxes on their personal property assessed in a special manner, as a unit or going concern; and on April 15, 1902, four days after the passage of the Willis law, sub-sections 17 to 22, inclusive, of Section 2780, Revised Statutes, were amended by an act found in 95 O. L., 136, by which union depot, telephone and telegraph companies were included with other companies required to re-

port to the Auditor of State, and to pay an excise tax upon their gross receipts. The last named act was designated as house bill No. 55, and the Willis law was designated as house bill No. 57, indicating that they were introduced about the same time and were under consideration together. It is thus evident that the General Assembly, in Section 7 of the Willis law, had in contemplation the passage of the amendatory act which was actually passed four days later. I see no reason why the latter act may not be regarded as an act *in pari materia*, when we are considering the intention of the General Assembly. 36 Cyc., 1149 and 1151. *Jones v. Carr & Co.*, 16 O. S., 420 (428).

In the original act passed March 19, 1896 (92 O. L., 79), providing for an excise tax on railroad companies and certain other corporations as well as in the act amendatory thereof passed April 15, 1902, it is only such corporations named as are defined in the act and doing business in this state that are required to file reports with the Auditor of State and to pay such tax; and in both of said acts it is provided that a corporation when engaged in the business of operating a railroad, either wholly or partially within this state, whether on rights of way acquired and held exclusively by such company or otherwise, shall be deemed to be a railroad company.

As the defendant company was not engaged in operating any railroad, it was not required to file any report with the Auditor of State under any of the acts referred to other than the Willis law. The Pennsylvania Company, operating the railroad of the defendant by virtue of the lease which has been mentioned, was subject to the law imposing an excise tax, and it made reports to the Auditor of State, and paid the excise taxes charged to it during the years involved here. I can not see any ground on which it can be claimed that such payment by the Pennsylvania Company is to be deemed a payment on behalf of the defendant company, or that the payment of such excise taxes by the former operated in any way to relieve the latter from its obligation to pay the entirely different tax under the Willis law. The Pennsylvania Company was operating said railroad as the tenant under said lease and on its own behalf, and solely by reason of

1913.]

Bagley v. Railway.

such operation it was chargeable with the payment of said excise taxes. As such tenant it can not be regarded as the agent of the defendant company.

My conclusion is, that the defendant comes within the provisions of Section 1 of the Willis law, not because it was operating any railroad, but because it was a corporation organized under the laws of Ohio for profit, and that it is not included within the exceptions under Section 7 of said law.

The defendant not having complied with said law by filing annual reports with the Secretary of State and paying a fee of one-tenth of one per cent. upon the amount of its outstanding capital stock for the years in question, I find for the plaintiff in this action; and the plaintiff having agreed to waive all penalties on the amounts claimed, and there being no claim for interest in the petition, the amount of the recovery will be the amount of the fees chargeable for said several years. As I figure it, the total amount of such fee is \$85,203.40, but before making the entry of judgment, I will ask counsel to verify this amount.

---

### **LIABILITY FOR DAMAGES RESULTING FROM A SEQUENCE OF EVENTS.**

Common Pleas Court of Hamilton County.

**JOHN M. BAGLEY v. THE CINCINNATI, GEORGETOWN & PORTSMOUTH RAILWAY COMPANY.**

Decided, November, 1912.

*Negligence—Pleading Where Damages Resulted from a Sequence of Events—Liability Where a Cow at Large Threw an Interurban Car from the Track.*

In an action for damages on account of loss through the negligence of the defendant, demurrer does not lie to an answer and cross-petition which denies negligence on the part of the defendant, and alleges that the loss resulted from a sequence of events put in motion by the plaintiff and the consequences of which might reasonably have been anticipated.

*William C. Lambert*, for the demurrer.

*Dinsmore & Shohl*, contra.

DICKSON, J.

Heard on demurrer to defendant's cross-petition.

Plaintiff sues to recover damages—\$75—because his cow was killed in collision by one of defendant's cars, by its negligence.

Defendant denies negligence and thus liability, and pleads in the alternative by conditionally setting up contributory negligence, and thus, too, denies liability.

Defendant by cross-petition sues to recover damages from the plaintiff in the sum of \$7,640, because this cow which collided with and caused a derailment of the car, caused damages to the car and rails in the sum of \$870, and caused by the collision, etc., injury to certain passengers in the car, for which the defendant has been compelled to pay in certain settlements the sum of \$6,770.

Defendant says the proximate and sole cause of the collision and the results therefrom was plaintiff's carelessness, because a short time before the collision he had separated this cow from her young calf and left them separated by the defendant's right-of-way, which included a certain fence, well knowing that the cow would get to the calf and across its track and right-of-way in spite of any ordinary fence, which ordinary fence it, the company, had maintained. Defendant says that the plaintiff thus carelessly created a sequence of events reasonably likely to follow and reasonably to be contemplated as natural and probable from such carelessness.

The cross-petition is good against a demurrer and the same will be overruled.

---

END OF VOLUME XIII.

---

# INDEX.

---

## ACTIONS—

An action to recover insurance premiums alleged to be due and unpaid is not an action on an account, but is for money paid out at the request of the defendant. 470.

An action can not be maintained against a municipality by a resident who has been cut off by the washing out of a bridge which the municipality has failed to restore, where he sues on behalf of all residents of the part of the city affected thereby. 519.

## ADMINISTRATOR—

An administrator is warranted in paying promissory notes, executed by the decedent and delivered to his house-keeper with the understanding that they were to become payable one day after his death and were to make good to her a reduction in her salary he had been compelled to make on account of a change in his circumstances. 186.

As to the right of an administrator to recover from one who dealt with the intestate on an unfair basis of value. 33.

Beneficiaries of a trust who, upon the death of the trustee, neglect to demand an accounting by his representative or file their claims with him, are subject to the bar of the statute of limitations and to all the restrictions which apply to the filing of claims against the estate of the decedent. 326.

Upon exceptions being filed to a long delayed final account, and reference of the matter for ascertainment of the amount due from the executor or administrator, it is not competent for the referee to reopen a previous account to which no exceptions were ever filed. 386.

An executor is not barred by the ten years statute from claiming credit for disbursements made more than ten years prior to the rendition of his final account. 386.

## ADVERSE POSSESSION—

Consent verbally given by a landowner to the adoption as the true boundary a line fixed by a surveyor, does not estop such landowner from afterward claiming by adverse possession up to the old line. 301.

## AGENCY—

As to service of summons on an agent of a foreign corporation doing business in this state. 423.

A tenant railway company is not the agent of the company owning the line of road. 671.

## APPEAL—

On appeal to the common pleas, a motion will lie to strike from the files an amended petition which states a cause of action different from that tried before the justice of the peace. 470.

A motion lies to dismiss an appeal from a justice of the peace, where the surety on the bond is not, and was not at the time of the



giving of the bond, a resident of the state. 532.

From the county commissioners in the matter of a ditch improvement; what constitutes a final order; burden of proof on the commissioners and petitioners affirming that the ditch will be conducive to the public health; verdict will be regarded as against the weight of the evidence, when. 585.

#### APPLES—

Liability of carrier for damages to apples rendered unsalable by negligence and delay in transit. 65.

#### ASSESSMENTS—

An action for recovery of unpaid street assessments is an action upon a liability created by statute, and is therefore controlled by the six years' statute of limitations. 631.

#### ASSIGNMENT—

Of a mortgage; construction of the act providing that failure to record the assignment renders the lien under the mortgage invalid as to subsequent purchasers without notice. 441.

#### ASSUMED RISK—

The defense of, is eliminated under the workmen's compensation act. 553.

#### ATHLETIC CLUB—

Property of, not taxable, when. 489.

#### ATTACHMENT—

The making of a demand in writing is not a prerequisite to the bringing of a suit in attachment for the excess over ninety per cent. of the personal earnings of the debtor, except where it is sought to reach the personal earnings of a married man. 73.

While it is the better practice to follow the statute strictly, a return of summons, showing that it was served on the "agent" of the defendant company within the

county in which the action was brought, will not be set aside. 73.

The statement in the affidavit that the plaintiff's claim is for "board, lodging and washing" is sufficient to save the action from a motion to discharge the attachment; but it is necessary that more facts be stated in the bill of particulars. 73.

Failure to aver in the affidavit that the claim was incurred in the county in which the suit is brought, renders the affidavit insufficient and requires that the attachment be discharged. 73.

Proof that the special constable, appointed to serve process, was not an elector of the township in which the action was brought, is ground for discharge of an attachment based upon such service. 73.

The affidavit for publication can not be assisted by the affidavit for attachment or by the petition, but each of the three must be sufficient in itself for the purpose which it fulfills. 546.

An affidavit for publication in an attachment proceeding is insufficient, if it neither refers to Section 11292 by number, or states that the action is one in which it is sought by a provisional remedy to take or appropriate the property of another; service under such an affidavit is open to a motion to quash. 546.

In an action for attachment statutory provisions must be strictly followed. 546.

#### ATTORNEY AND CLIENT—

The fee regularly allowed to counsel for plaintiff in a partition case may be divided with other counsel appearing in the case, who performed services of benefit to the parties in interest and assisted in the determination of the case. 153.

The fixing of fees to be paid to counsel by a church for services in defending the title of its property, where an unnecessary amount of labor was performed by counsel



for the church and difficulty was experienced in finding attorneys who were willing to testify against a brother attorney in a matter affecting the amount of fees to be paid to him. 169.

A court will not be entirely governed, in an action to recover counsel fees, by the fact that certain attorneys testified that the services rendered were worth a very large sum and no attorneys were called in opposition thereto. 169.

An attorney acquires an equitable lien on the proceeds of a judgment recovered through his efforts in favor of his client, and where no agreement was entered into as to the amount of compensation he was to receive, the extent of the lien so acquired will be the reasonable value of the services rendered. 409.

An action to determine the amount due an attorney on account of services in procuring a judgment in process of settlement is an equitable proceeding, properly referable to a master for report, and does not fall under Section 11379, providing how certain issues shall be tried. 409.

Counsel rendering services for a receiver will be permitted to file an intervening petition for the recovery of compensation therefor, but will not be permitted to file a separate action at law against the receiver. 425.

A misunderstanding between attorney and client, which resulted in a default judgment being taken against the client, does not constitute such unavoidable casualty or misfortune as authorizes the setting of the judgment aside after term. 562.

#### **AUTOMATIC COUPLERS—**

See RAILWAYS.

#### **AUTOMOBILE—**

Liability for a collision between an automobile and an interurban car at a road crossing; blowing of

warning whistle one thousand feet from crossing held to not necessarily relieve the railway company from liability. 659.

#### **BAIL—**

Where the right to bail exists, the only duty pertaining to the office of one authorized to accept bail relates to the sufficiency of the bond in form and amount, without regard to the character of the proposed surety with respect to his being a professional bondsman. 198.

#### **BENEFICIARIES—**

Under a policy in a mutual benefit society—see MUTUAL BENEFIT SOCIETIES.

#### **BIDS AND BIDDING—**

Material may be adopted for a public improvement which is manufactured by only one firm, if it is selected in the exercise of a reasonable discretion as the best offered for the purpose intended, and it is not covered by patents. 537.

Competitive bidding is not required in the case of a municipality entering into a contract with expert engineers to locate serious water waste. 558.

#### **BILL OF EXCEPTIONS—**

The work of preparing a bill of exceptions for the purpose of prosecuting error can not be taxed as a part of the costs. 59.

#### **BONDS (Surety)—**

A bond filed with the application for a joint county ditch and signed by one of the petitioners as principal and by the other two petitioners as sureties, is sufficient. 42.

Required, on application to set aside a judgment, for payment of the original judgment or any modification thereof. 49.

#### **BOUNDARY—**

The boundary line between adjacent lands can not be changed

by consent of owner verbally given. 301.

An owner is not estopped from insisting that the line of a fence which has stood for more than twenty-one years shall be treated as the true boundary line, notwithstanding he procured a survey which located the true line twelve feet over on his land, and upon completion of the survey he gave permission to the adjacent owner to proceed with the building of a new fence on the new line. 301.

#### **BREACH OF CONTRACT—**

See **CONTRACT**.

#### **BREACH OF PROMISE—**

It is within the discretion of a trial judge to require the plaintiff in an action for breach of promise to marry to submit to a physical examination where the physical incapacity of the plaintiff has been asserted as a defense. 161.

#### **BROKER—**

A broker who buys shares of stock for an undisclosed principal becomes personally liable to the seller upon default of the principal, and he is not relieved from such liability by making known that he is buying for a third person, unless he names his principal so that the seller may know to whom he is selling. 505.

In case of default of an undisclosed principal, the seller may rescind the contract, retain the stock, and recover from the broker the difference between the contract price and the market price at the time of the default. 505.

#### **BURDEN OF PROOF—**

In the matter of an appeal from the county commissioners declaring for a ditch improvement, the burden is upon the commissioners and petitioners affirming that the proposed improvement will be conducive to the public health. 585.

#### **CAPACITY—**

To maintain an action to contest a will—see **WILLS**.

#### **CARRIERS—**

Custom and usage will not be considered in an action on a bill of lading, when; liability of carrier for apples rendered unsalable in transit. 65.

Classification of merchandise shipped by express; rates on printed sheets shipped to newspapers in which they are to be incorporated. 403.

#### **CAVEAT EMPTOR—**

The doctrine of, applies to the matter of defects in leased premises, unless the lessee protects himself against defects by a special covenant. 98.

#### **CHARACTER—**

Proof introduced for the purpose of placing a woman in the class known as common prostitutes should go to her character rather than her reputation. 508.

#### **CHANGE OF GRADE—**

See **MUNICIPAL CORPORATIONS**.

#### **CHARGE OF COURT—**

In an action for damages growing out of negligence or carelessness, it is reversible error to fail to define the issues and elucidate the law relating thereto. 191.

Reading the pleadings to the jury without defining the issues constitutes reversible error. 191.

#### **CIVIL RIGHTS—**

Right of a colored man to maintain an action for damages on account of exclusion from a place covered by the statute. 313.

A confectionery and ice cream parlor falls within the civil rights statute, when. 313.

#### **CONCEALMENT—**

Necessary allegations as to concealment of defects in leased prem

ises, which have resulted in injury to the tenants. 98.

**CONSTABLE—**

See **SHERIFF AND CONSTABLE.**

**CONSIDERATION—**

Inadequacy of, where an exchange of property was made with an aged man; effect of allegations as to false representations, duress and senility. 33.

Right of an administrator to recover from one who dealt with the intestate on an unfair basis of value. 33.

Mere inadequacy or inequality in value between the subject-matter and the price does not furnish a basis for remedial effect, in the absence of inequitable incidents, or when the circumstances do not show the same to be so gross as to constitute fraud. 33.

**CONSTITUTIONAL LAW—**

The answers required under the Dean character law, from one engaged in the sale of intoxicating liquor, do not render said law unconstitutional because of possible incrimination of the person answering. 121.

Nor is the Dean law in contravention of the constitutional provision against licensing the traffic in intoxicating liquors. 121.

Section 8897, authorizing a municipality in constructing a highway across an existing railroad to build it otherwise than at grade and charge one-half of the costs thereof to the railroad company, is unconstitutional for the reason that no provision is made for notice to the company of such intention, with opportunity to be heard as in other assessment cases. 276.

Section 13407, defining vagrancy and providing for the fining and imprisonment of vagrants, is indefinite to a degree which renders its enforcement impracticable, and is in violation of the inalienable rights to liberty clause of the Bill

of Rights, and both the statute and the Cincinnati ordinance enacted thereunder are unconstitutional. 278.

**CONTRACTS—**

As to release from an agreement perhaps purposely made indefinite; estoppel where there has been partial performance. 259.

Allegations as to an agreement alleged to be in breach are sufficient, when; facts excusing non-performance are not immaterial or irrelevant; as to the pleading of evidential and ultimate facts and inconsistent facts in the alternative. 364.

Power of a municipality to contract with a public utility company for the use of its streets for a consideration. 394.

Failure by a contractor to comply with conditions of a public contract, which have been waived by the proper authorities, is not a ground for injunction against the carrying out of the contract, where fraud or misconduct is not shown. 551.

**CONTEMPTS—**

It is not contempt of court for persons who have been enjoined from entering into the telephone business to communicate with each other over private lines, which are not connected with any switchboard and are not capable of serving anyone except those on the particular wire used. 429.

**CONVEYANCE—**

Where a purchaser has no knowledge of the existence of an easement for a drain, the easement is extinguished and he takes the property free from such easement. 601.

**CORPORATIONS—**

An action by a stockholder in a railroad company to enjoin the acquisition by the company of stock in another railway on the ground that such acquisition would be

*ultra vires*, is an action for the protection of the property rights of the stockholder, and the company whose stock it is proposed to acquire is not a necessary or proper party. Such an action must be brought in a county having jurisdiction over the company in which the plaintiff is a stockholder. 217.

As to taxation of the property of corporations in process of dissolution. 321.

An agent of a foreign corporation doing business in this state may be served with summons in any county in the state where he may be found and by process issuing out of any county in the state. 423.

Where stock is forfeited for failure to pay assessments and a new company is subsequently organized to take over the property, the owner of the forfeited stock, afterwards, for many years and until the property has become valuable, will not be heard to complain, notwithstanding some irregularities in the cancelling of the delinquent stock and dissolving of the old company. 523.

It is not necessary in an action by a foreign corporation that the petition aver compliance with the statutory requirement as to the filing of a certificate with the Secretary of State as a condition precedent to the right to do business in the state; the defense of non-compliance must be raised by answer, does not go to the jurisdiction of the court, and is too late after judgment. 562.

Where an action is brought against a corporation, and its president is also made defendant both as president and individually, but the only cause of action stated in the petition is against the corporation, the other defendant will be dismissed both as president and individually. 580.

The statutory provision that the books and records of a corporation

for profit shall be open to inspection by holders of its stock at all reasonable times, applies to holders of preferred as well as of common stock. 580.

#### **COSTS—**

Expenses of litigation distinguished from costs. 59.

The word "costs" has a fixed legal significance, and includes only such items as are allowed by statute, and the expense of preparing a bill of exceptions for the purpose of prosecuting error can not be taxed as a part of the costs. 59.

Where a judgment is recovered for less than \$100 and more than \$5 as damages on account of a nuisance, the plaintiff is not precluded from recovering costs. 373.

#### **COUNSEL FEES—**

See ATTORNEY AND CLIENT.

#### **COUNTY AUDITOR—**

Corrections made by the County Auditor in the tax duplicate before the close of the year 1910, were not affected by the tax commission act. 377.

#### **COUNTY COMMISSIONERS—**

Compliance by county commissioners with the provisions of Section 2343, with reference to plans and estimates for buildings, bridges, etc., is a common precedent to the making of a valid contract for the contemplated improvement; a petition in mandamus to compel the letting of the contract to the relator will not lie, in the absence of allegations that these conditions precedent have been complied with. 246.

#### **COURTS—**

Inherent and plenary power of a court with its limitations; how this power may be invoked. 49.

Circumstances under which a court of equity may interfere with the administrative government of a municipality. 81.

A police court is without jurisdiction to try, without a jury, one charged with an offense for which imprisonment can be imposed, unless a jury has been waived in writing. 119.

The doubts of a chancellor will be resolved against a plaintiff who is charged with secretly carrying on gambling and is asking for an injunction against police surveillance. 137.

Power of a trial judge with respect to the granting of a remittitur. 169.

"Opinion" of the court and "decision" of the court distinguished. 244.

#### COVENANTS—

Agreement to maintain a stairway held to constitute a covenant running with the land. 478.

#### CROSSER ACT—

Construction of paragraph 12 of said act, relating to municipally owned gas and electric works. 281.

As to when an ordinance for the expenditure of money becomes operative under the Crosser act. 281.

#### CRIMINAL LAW—

A magistrate or police judge is without jurisdiction under the law of Ohio to try, without a jury, one charged with an offense for which imprisonment can be imposed, unless a jury has been waived in writing. 119.

Bail can not be refused on the sole ground that the party offered as surety is proposing to go upon the bond for hire. 198.

The bar of the statute limiting the time for prosecuting misdemeanors to three years from the date of the offense, is prevented from falling where a preliminary hearing has been had within the three year period, notwithstanding the indictment was not returned for more than three years after the commission of the offense. 199.

Magistrates have final jurisdiction under Section 13432, in cases in which imprisonment is a part of the penalty and a jury is waived. 254.

A letter written by the accused to the prosecuting witness is not competent evidence, but a court will not reverse the judgment on account of its admission, when. 223.

Disorderly conduct is not defined by any Ohio statute, and there is no authority for prohibiting loitering by ordinance. 325.

Prosecution of the keeper of a dram shop under an ordinance prohibiting the use of such a place as a resort for prostitutes. 508.

The use of public funds by the official in whose custody they are placed does not constitute an offense, unless there is a defalcation on the part of the official. 665.

#### DAMAGES—

Failure to rescind promptly an inequitable contract entered into with an aged man does not afford a basis for an action for damages for undue influence in the transaction. 33.

To property caused by negligence; owner indemnified by way of insurance may still proceed against the party causing the injury, when; actions which are assignable; defenses. 133.

Sustained by a woman in delicate health through the seizure, by mistake but without justification, of her household furniture by the agents of an installment house, reduced from \$3,500, as fixed by the jury, to \$2,000. 473.

Measure of, where stock is sold through a broker to an undisclosed principal who defaults and thereby makes the broker liable for the loss sustained by the seller. 505.

#### DECISIONS—

The time for filing a motion for a new trial runs from the an-

nouncement of the decision in the case; opinion of the court and decision of the court distinguished; if the remarks of the court are intended as its decision under the code, an entry to that effect should be made of record. 244.

#### DEED—

A deed by the sheriff in a partition proceeding is the deed of the parties to the proceeding and the purchaser is their grantee, and the transfer in such a case completely extinguishes all title and interest of the said parties to the property conveyed. 329.

Allegations necessary in an action for damages for shortage in land conveyed under a deed of general warranty. 215.

The recital in a deed, "subject to the condition that the owner of the part of the lot herein described shall build, construct, maintain and keep in repair a passage, stairway and landing, not less than three feet in width," etc., constitutes a covenant running with the land, and not a condition subsequent or agreement personal to the parties thereto. 478.

In construing such a recital it is not error to admit testimony throwing light upon the circumstances surrounding the parties to the deed at the time of its execution. 478.

#### DEFENSES—

In an action for damages to property from negligence, the defense that the plaintiff has assigned the claim to a person unknown to the defendant constitutes a defense. 133.

Where the defense of physical incapacity is asserted in an action for breach of promise to marry, it is within the discretion of the trial judge to require the plaintiff to submit to a physical examination. 161.

The defenses of the fellow-servant rule, contributory negligence and assumption of risk are elimi-

nated from actions for injuries to employes, brought under the workmen's compensation act. 553.

The defense that a plaintiff foreign corporation has not complied with the statutory requirements as to the filing of a certificate with the Secretary of State, does not go to the jurisdiction of the court and is too late after judgment. 562.

#### DESCENT AND DISTRIBUTION

Where a wife takes title in her own name to property purchased for a home with funds given to her by her parents for that purpose, and dies intestate and without issue, the property will be treated as having come to her by purchase rather than from an ancestor, and title thereto passes to her husband and his heirs and devisees under the rule that the descent of real estate is controlled by the legal title. 662.

#### DEVISE—

A devise of property to a wife for life, with power to sell and consume, is a devise of a life estate only. 193.

A devise of real estate in Ohio to A C "for the term of her natural life, and at her death to go to the heirs of her body in fee," made by a resident of Ohio subsequent to 1840, does not create an estate tail in A C, but vests in A C an estate for life with remainder to the issue of her body; the rule in Shelley's case can not be applied to declare such a devise an estate tail. 329.

The rule in Shelley's case is a rule of property, and not a rule of construction to be applied in the determination of the meaning of language in a grant or devise; and since the abolition of this rule in Ohio, as to wills, in 1840, it can not be invoked either as a rule of property or construction to determine the character of the estate devised. 329.

#### DISCRETION—

Of a trial judge in requiring a



plaintiff to submit to a physical examination. 161.

Of county commissioners in making an award for public work to the lowest and best bidder. 246.

In allowing an application for a revivor against the representative of a deceased defendant. 547.

#### DISORDERLY CONDUCT—

Is not defined by any Ohio statute; loitering can not be regarded as disorderly conduct as a matter of law. 325.

#### DISMISSAL—

An appeal is open to, where the cause of action has been changed. 470.

#### DISSOLUTION—

Of corporations; as to taxation of property belonging to. 321.

#### DISTRIBUTION—

Consideration of the Massachusetts and the American rules as to distribution between life tenants and remaindermen. 1.

Distribution will be made among those living at the time of the testator's own death and the death of his wife *per stirpes*, where by the term "lawful heirs" as used in the will the testator referred to brothers and sisters of both his wife and himself as a class and the gifts were made direct. 1.

Will be made under the Ohio law where the facts presented at the time the will was admitted to probate supported the conclusion reached by the court that the testator was a resident of Ohio. 1.

Representatives of life tenants are entitled on final distribution to receive that portion of the fund in the hands of the trustee which should have been distributed to the life tenants during their lives as income from the trust fund. 1.

Apportionment of the proceeds from the sale of the entire assets of what was originally the Latrobe Steel Works. 1.

#### DITCHES—

A bond filed with an application for a joint county ditch is sufficient when signed by one of the petitioners as principal and the two other petitioners as sureties. 42.

A single joint meeting of the commissioners of two counties, at the head of the main line of a proposed joint county ditch is sufficient, without the holding of other meetings as to the laterals. 42.

It is not necessary that all the members of a joint board or a majority of each board be present to constitute a sufficient "view." 42.

Adjourned meeting of joint board not effective where held without notice to interested parties. 42.

The final order from which an appeal may be taken in a ditch proceeding from the county commissioners to the probate court is the determination reached at the final hearing. 585.

Where an appeal is taken from an order declaring for a ditch improvement, the burden is upon the commissioners and appellants affirming that the ditch will be conducive to the public health, and not on the appellants denying that such would be the fact. 585.

A verdict in favor of a proposed ditch improvement will be regarded as against the evidence where not based on any evidence that it will be conducive to the public health, convenience or welfare, notwithstanding the reviewing court did not have all the evidence before it, the view had by the jury of the proposed improvement being missing therefrom. 585.

Easement for drain of strict necessity and easement by implication; drain from property on one lot carried across an adjoining lot belonging to the same owner; rights of subsequent owners of both lots. 601.

**DIVORCE—**

A decree of divorce will not be granted against a husband on the ground of habitual drunkenness for three years, where there is proof that he is an industrious man, and desires to live with his wife and provide for their children, and there is no proof his having been intoxicated, except on four occasions, during the last three years. 114.

The statutory provisions for service of summons in actions for divorce should be strictly construed and followed, which requires that where the defendant is a non-resident of the state, notice must be given by publication, and not by personal service. 550.

**DIVIDENDS—**

Apportionment of stock dividends between life tenants and remaindermen, where stocks placed in trust by the testator increased enormously in value through segregation of surplus earnings. 1.

**DRUNKENNESS—**

Is not an offense under the laws of Ohio, unless the good order and quiet of the municipality is thereby disturbed. 104.

Proof that a husband has been intoxicated four times in three years is not a sufficient base for a charge of habitual drunkenness in a divorce proceeding. 114.

**DURESS—**

See MISREPRESENTATIONS.

**EASEMENTS—**

When an easement is created for a private drain; where use of drain is not granted by conveyance, but the premises are conveyed with all appurtenances, rights or privileges, an easement is created by implication. 601.

There can be no implied easement of drainage by strict necessity, where a vault or cess-pool can be constructed on the premises

which will take up the drainage, even though the construction of vault will involve considerable expense and be less convenient than the drain and may detract from the appearance and value of the property. 601.

**ELECTION—**

Can not be required as between allegations of fact. 364.

**EMBEZZLEMENT—**

A public official can not be convicted for using funds in his custody by law, if no defalcation has occurred, and if a defalcation is not shown a motion to dismiss one so charged will lie. 665.

**EMPLOYER AND EMPLOYEE—**

See MASTER AND SERVANT.

For an order enjoining a lock-out—see STRIKES.

**EQUITY—**

Attitude of a court of equity with reference to disputes between capital and labor. 311.

As between two innocent parties claiming interest in land. 441.

**ESTOPPEL—**

Where one of two parties secures from the other the partial performance of an agreement, and in so doing is aware of the understanding the party performing has as to the conditions embodied in the agreement, the said party is estopped, at least until the party performing is placed in *statu quo* from denying that the agreement should be interpreted in the manner understood by him, and upon full performance he is entitled to all the benefit flowing therefrom. 259.

Does not lie against a landowner who consented verbally to the adoption of a new line between his land and that of the adjacent owner and afterwards withdrew his consent. 301.

A party to a partition proceeding, who has accepted its benefits,



is estopped from denying the validity thereof. 329.

A gas company is estopped from denying the validity of an ordinance which it accepted and under which it has been operating for many years. 394.

**EVIDENCE—**

Competency of, where relating to an oral agreement between landlord and tenant. 27.

A physician who has been ordered to examine one of the parties to the action, can not claim privilege but may be required to testify as to the condition of said party. 161.

Weight of, where given by attorneys as to the value of the services rendered by counsel in the case in hand. 169.

As to intention of the parties to a conveyance of land subject to a servitude by agreement to maintain a structure. 478.

As to the character of the evidence required to place a woman in the class known as common prostitutes. 508.

Verdict will be regarded as against the weight of, where in a ditch improvement proceeding the jury under a misapprehension returned a verdict which was not based upon any evidence. 585.

**EXECUTION—**

Injunction against levy of. 259.

**EXECUTOR—**

See ADMINISTRATOR.

**EXPRESS COMPANY—**

Classification of merchandise shipped by. 403.

Jurisdiction in matters of complaint as to classification of merchandise or of rates. 403.

**FELLOW SERVANTS—**

The defense of the fellow-servant rule is eliminated under the workmen's compensation act. 553.

**FENCE—**

Along a railway right-of-way—see RAILWAYS.

Difficulties encountered by a landowner in changing a boundary line which has been fixed for more than twenty-one years by an old fence. 301.

A landowner is not estopped from claiming under adverse possession by the fact that he has consented verbally to the adoption of a newly surveyed line. 301.

**FINAL ORDER—**

In a ditch proceeding before a board of county commissioners the final order from which an appeal may be taken to the probate court is the determination reached at the final hearing. 585.

**FIXTURES—**

Public policy, having in view the encouragement of trade, is tending to relax the old rule as to ownership of fixtures. 27.

In providing fixtures for carrying on business on leased property, testimony as to an oral agreement between the landlord and an officer of the lessee company that fixtures so installed were to be regarded as a part of the realty is inadmissible as showing intent that they should be regarded as part of the realty, in the absence of any rule of the company or action by the board of directors authorizing such agreement. 27.

Spur railway tracks and a track scale, so built as to be removed with comparative ease from the freehold, are trade fixtures, which may be removed by the lessee installing them there, where the lease contains no provision with reference to such fixtures and no provision that such installations shall become a part of the realty. 27.

**FORFEITURES—**

Under the railway coupler act. 145.

**FRANCHISES—**

A franchise which gives to a company merely the right to exist distinguished from a special franchise. 429.

A franchise to an interurban railway does not give the company the right to use a portion of one of the streets designated therein as a station for loading and unloading freight. 487.

A franchise for the construction of a municipal water works system may be granted to an individual as well as to a corporation. 651.

**GAMBLING—**

Interference by the police with a legitimate business will not be enjoined, where it is charged that the business is a cloak for gambling transactions, and the testimony of the proprietor exhibits a lack of candor and a willingness to suppress the facts. 137.

**GAS COMPANY—**

Is estopped from denying the validity of an ordinance which it accepted and under which it has been operating for many years. 394.

A municipality has power to contract with a gas company for the use of its streets for a consideration in the laying of pipes for distribution of gas, and the collection by the municipality from the company of ten per cent. of the gas sales in accordance with a contract so made can not be successfully resisted on the ground that it is unreasonable or that it is an unconstitutional taking of its property without due process of law. 394.

**GIFTS—**

Promissory notes made by a decedent in favor of his housekeeper held not to have been gifts without consideration. 186.

**GOOD WILL—**

Of a newspaper is subject to taxation. 358.

**GYMNASIUM—**

Property of, not taxable, when. 489.

**HOMESTEAD EXEMPTION—**

A husband and wife are "living together" within the meaning of the homestead exemption statute, notwithstanding the husband disappeared after making an assignment for the benefit of his creditors and his whereabouts are now unknown, if the wife expresses confidence that he will return to her as soon as he is again able to provide for her support. 105.

If in such a case the wife is a resident of the state and the husband when last heard from was a resident of the state, it will be assumed that he is still a resident of the state. 105.

The fact that at the time of the assignment the assignor and his wife were living in a house which belonged to her and was heavily encumbered with liens, and from which they removed and she has collected the rents therefrom, is not a bar to allowance to homestead exemption. 105.

**HORSE—**

An action for damages for injury to a horse resulting from a hole in a public street is an action for a nuisance. 373.

**HUSBAND AND WIFE—**

Are "living together" within the meaning of the homestead exemption statute, when. 105.

Property purchased by a wife with her own means and title to which is taken in her own name, upon her death, intestate and without issue, passes to her husband and his heirs and devisees under the rule that the descent of real estate is controlled by the legal title. 662.

**INDEMNITY—**

The fact that the owner of property damaged by negligence has received indemnity therefor by way of insurance can not be pleaded as a defense in an action by the owner against the party causing the damage. 133.

**INFANTS—**

In an action by a minor through his next friend for damages for personal injuries, a motion lies to strike from the petition items of expense for board, lodging and medical care. 599.

**INJUNCTION—**

Lies, where a labor organization has split into two hostile factions, to restrain one of the factions from threatening to strike or quit in a body employment where in the other faction is employed or are promised employment. 110.

Against interference with a legitimate business by the police is not available to one who may be concealing transactions of a forbidden character, such as gambling, and the doubts of a chancellor will be resolved against a plaintiff who is charged with secretly carrying on gambling and in giving his testimony exhibits a lack of candor and a willingness to suppress the facts. 137.

Circumstances under which a nisi prius court will decline to grant an injunction in accordance with its decision until a reviewing court has determined that the law is correctly interpreted in said decision. 265.

Against a levy of execution. 259.

Lies against the enforcement of an order for lockout, where under the rules of the organization of employers who made the order its members are liable to fine or expulsion for disobedience thereof. 297.

A blanket injunction will not be issued against a labor union for

the purpose of restraining its unnamed members from permitting offenses, nor against the individual members of a union, unless. 311.

Does not lie against a local telephone company to prevent its carrying on business, when. 429.

**INSURANCE—**

An action to recover insurance premiums alleged to be due and unpaid is not an action on an account, but is for money paid out at the request of the defendant. 470.

Marriage of a policy holder in a mutual benefit society does not revoke a previous designation of the beneficiaries under the policy. 568.

**INTERURBAN RAILWAYS—**

See STREET RAILWAYS.

A franchise granting the right to use certain streets does not include the right to use one of them as a station for loading and unloading freight, when. 487.

**INTOXICATING LIQUORS—**

The Dean character law is not in contravention of constitutional rights, nor is it a denial of equal protection of the laws, or of the inhibition against the sale of intoxicating liquors. 121.

An allegation, by one who claims to have retired from trafficking in intoxicating liquors, of the mere filing of an affidavit with the auditor setting forth his retirement, does not meet the requirement of the statute that the auditor must be "satisfied" the business has been abandoned before he issues a refunding order. 230.

Where neither the petition for the prohibition of the sale of intoxicating liquor in a residence district, nor the map attached thereto, nor the map and petition taken together, gives the number and location of all the saloons in the proposed territory, the requirement of the statute that the num-

ber and location of saloons be shown has not been complied with, and the petition must be dismissed. 582.

#### JONES LAW—

See INTOXICATING LIQUORS.

#### JUDGMENT—

For the vacation of a judgment at the term of its rendition, the defendant should file a motion setting forth statutory or other sufficient grounds and give plaintiff reasonable notice in writing of the time and place of the hearing demanded. 49.

Proper method of presenting a motion to vacate a judgment; an order will be allowed suspending the judgment and allowing an injunction, when; procedure upon second trial. 49.

As to an attorney's lien on the proceeds of a judgment secured through his efforts. 409.

A misunderstanding between attorney and client, resulting in the taking of a default judgment against the client, does not constitute such unavoidable casualty or misfortune as authorizes a vacation of the judgment after term. 562.

#### JURISDICTION—

Of a magistrate or police judge to try without a jury depends upon waiver in writing, if the offense is one for which imprisonment can be imposed. 119.

Will not be taken by an Ohio court, where the action is for malicious imprisonment by officers of another state and an action for damages on account of such imprisonment is pending in the state and county in which the alleged tort was committed. 222.

In the matter of complaints as to classification of merchandise shipped by express and the rates charged therefor. 403.

#### JURY—

Must be waived in writing, in order to give a police court magistrate jurisdiction to try one for an offense for which imprisonment may be imposed. 119.

#### JUSTICE OF THE PEACE—

Jurisdiction of, in cases where imprisonment may be imposed and no plea of guilty has been entered. 119.

Final jurisdiction is given to justices of the peace in cases in which imprisonment is a part of the punishment and a jury is not waived, and where it is attempted to carry such a case to the probate court a motion to discharge the accused will lie. 254.

#### KNOWLEDGE—

Necessary allegations with reference to knowledge in an action by a tenant against his landlord for injury from defect in premises. 98.

Proof of, on the part of the keeper of a dram shop that certain women whom he has permitted to resort to his place are common prostitutes. 508.

#### LABOR UNIONS—

Where a labor organization split into two hostile factions, injunction will lie upon petition of one of the factions to restrain the other from threatening to strike or quit in a body employment where the plaintiffs are employed or are promised employment. 110.

#### LACHES—

In paying taxes on land belonging to another. 457.

A stockholder whose stock was forfeited for failure to pay assessments will be denied relief, where no claim is made for many years, during which time the prop-

erty of the company consisting of land has become valuable. 523.

**LANDLORD AND TENANT—**

Railway tracks and track scales placed upon leased property are trade fixtures, when. 27.

In the installation of fixtures by a lessee the question of intent with reference to their becoming a part of the freehold can not be established by oral testimony, when. 27.

Public policy, having in view the encouragement of trade, is tending to relax the old rule as to fixtures. 27.

A lessee who desires to protect himself as to the condition of the premises he is about to lease must bind the lessor by an express covenant as to condition; this necessity exists without regard to the length of the lease or whether it be oral or written. 98.

An action against a landlord for injuries to a tenant, due to the defective condition of the demised premises, can be based on fraudulent concealment of the defect by the landlord only when there is an allegation of knowledge of the defect on the part of the landlord and of want of knowledge by the tenant and that the defect was concealed by the landlord. 98.

Knowledge on the part of a landlord of vacation of premises before expiration of lease, does not amount to a cancellation of the contract of lease, unless he assented thereto by some act, such as the acceptance of rent from a new tenant. 449.

Where no assent to the vacation of premises is given, a petition filed by the landlord for the rental for the remainder of the term is not open to demurrer on the ground that he has thereby admitted the cancellation of the lease, and consequently is limited in his remedy to an action for damages on account of violation of the contract of lease. 449.

**LEASE—**

As to claim for injury to tenant on account of defective condition of the premises—see **LANDLORD AND TENANT**.

Of oil and gas lands; liability of lessee for cash rental, where no well is completed during the first year. 453.

Where premises are vacated before expiration of the lease, the owner's remedy is an action for rental rather than an action for damages, when. 449.

**LEGAL ETHICS—**

In the matter of giving testimony as to the value of services rendered by a brother attorney. 169.

**LIEN—**

How a lien may be asserted by an attorney for services rendered in procuring a judgment in process of settlement; extent of such lien; mode of trial. 409.

**LIFE ESTATE—**

A devise to a wife for life with power to sell and consume, is a devise of a life estate only. 193.

**LIFE TENANTS—**

Consideration of the Massachusetts and the American rules as to distribution between life tenants and remaindermen. 1.

Apportionment to the representatives of life tenants upon final distribution under a will where stocks were placed in trust by the testator. 1.

**LIMITATIONS OF ACTIONS—**

The statute of limitations does not run as to nuisances placed in the streets. 193.

The statute of limitations runs against the beneficiaries of a trust from the time of the death of the trustee, and all the restrictions which apply to the filing of claims against the estate of a decedent obtain against them. 326.

The ten years statute of limita-

tions does not run against an executor as to claims for credits for disbursements made more than ten years before the rendering of his final account. 386.

An action for recovery of unpaid street assessments is an action upon a liability created by statute, and is therefore controlled by the six years statute of limitations. 631.

#### LOCKOUT—

See STRIKES.

#### LOITERING—

Municipalities are without statutory authority for the enactment of an ordinance making loitering or wandering about the streets a crime. 325.

A conviction can not be sustained by holding that loitering constitutes disorderly conduct as a matter of law. 325.

#### MALPRACTICE—

Revivor out of time permitted against the executors of a deceased physician sued in his lifetime for malpractice. 547.

#### MANDAMUS—

Will lie to compel the acceptance of sufficient bail in a criminal proceeding, notwithstanding the surety is proposing to go on the bond for hire. 198.

Will not lie to compel county commissioners to award a contract to the relator in the absence of allegations that the conditions precedent to the letting of such a contract by the commissioners have been complied with. 246.

#### MARRIAGE—

Does not revoke a designation of beneficiaries under a policy of insurance in a mutual benefit society. 568.

#### MASTER AND SERVANT—

Construction of the new workmen's compensation act—see WORKMEN'S COMPENSATION ACT.

Servant permitted to maintain an action against his master and a tenant of his master, on account of injuries received while assisting the foreman of the tenant. 307.

#### MERGER—

Merger of the greater estate in the less is not effected where a grantor holding a purchase money mortgage received a re-conveyance of the land from the grantee, and the mortgage was not surrendered by him upon receiving the re-conveyance or at any time thereafter, but had been assigned and thus had passed into possession of third parties. 441.

#### MISDEMEANORS—

The bar of the statute limiting the time within which misdemeanors may be prosecuted is prevented from falling, if the preliminary hearing occurs within the three year period. 199.

#### MISTAKE—

Of county auditor, resulting in the plaintiff paying taxes for a long period on land belonging to another; error fundamental rather than clerical, and refunder for taxes so paid refused. 457.

#### MORTGAGE—

Where persons who do not have title to real estate join in a mortgage to secure payment of their own debt or the debt of any of them, and in the mortgage warrant their title, the covenant as to title runs with the land, and they are estopped from subsequently setting up their want of title at the time the mortgage was executed. 329.

Construction of the act providing that failure to record an assignment of a mortgage renders the lien thereunder invalid as to subsequent purchasers without notice; right of a purchaser to rely upon a title as it appears of record; merger. 441.



**MUNICIPAL CORPORATIONS—**

The right of an abutting owner to compensation on account of change of grade vests not later than the time when the work of changing the grade has so far progressed as to materially obstruct and interfere with access to the property; and in the absence of an agreement to the contrary the right to receive such compensation remains in such owner, and does not pass to a grantee to whom the property was transferred subsequent to such vesting. 209.

Whether a hole in the street, which has caused an accident, was of sufficient size to constitute a dangerous defect, will be left to the jury for determination under all the circumstances of the case, where the question is one about which reasonably prudent men might disagree; recovery is not precluded on the ground of contributory negligence, where it appears that at the time of the accident the hole was partly filled with freshly fallen snow. 249.

As to whether two street railway fares can be collected for the same continuous journey in the same general direction within the corporate limits of Cincinnati. 265.

The provisions of Section 8897, giving municipalities authority to carry streets over existing railways otherwise than at grade and charge one-half of the cost to the railroad, is unconstitutional for lack of provision for notice to the company with an opportunity to be heard as in other assessment cases. 276.

An election to authorize an issue of bonds by a municipality in excess of two and one-half per cent. of the aggregate value of property listed for taxation is rendered invalid where less than sixty days elapsed between the passage of the resolution declaring the necessity for such an issue and

the election approving the issue. 281.

A resolution declaring the necessity for such an issue existed "in the fiscal year" during which the resolution was adopted, and that it is not rendered invalid by reason of the fact that the proceedings with reference thereto were not completed until after another fiscal year had begun. 281.

An ordinance providing for an expenditure of money does not become operative under the Crosser law (Section 4227-1) until sixty days after its passage, and an advertisement for the sale of bonds to provide the necessary funds is without authority of law until the sixty days have expired; bids can not be lawfully opened and the bonds sold under an advertisement prematurely made. 281.

Paragraphs 12 of Section 3939, as they appear in the act approved May 22, 1911, and May 26, 1911, are reconcilable and exhibit a legislative intent to give to municipalities power to purchase or erect electric light plants for the purpose of furnishing light to the municipality and its inhabitants, and it follows that an ordinance providing for the erection of such a plant and the supplying of light therefrom does not contain a dual purpose and is not subject to attack on that account. 281.

Municipal councils without authority in Ohio to prohibit loitering by ordinance. 325.

An action for damages for injury to a horse resulting from a hole in a public street is an action for a nuisance. 373.

A municipality may, in its proprietary character, make a contract with a gas company, granting to such company the right to use the city streets for the laying of pipes for distribution of gas consumers, and providing a consideration for such use. 394.

A gas company, which has ac-

cepted the terms of an ordinance and has laid its pipes in the streets where they have been in use for many years, can not thereafter deny the validity of the ordinance under which it is operating. 394.

Nor can such a company successfully resist as unreasonable, or as an unconstitutional taking of its property without due process of law, the collection by the municipality of a consideration of ten per cent. of its sales of gas as provided in its contract for the use of the streets. 394.

Liability of a municipal corporation for damages to adjacent property from the bursting of a sewer during high water; effect of the building of an embankment. 467.

Construction of franchise to an interurban railway company with reference to the use of one of the streets designated therein as a station for loading and unloading freight. 487.

An action will not lie against a municipality for damages growing out of the closing of a street to travel by the washing out of a bridge, where plaintiff sues on behalf of all the residents of the part of the city affected thereby. 519.

The determining ordinance with reference to a public improvement is the one appropriating the proceeds from the sale of bonds to that purpose, and where this ordinance is published in accordance with law injunction will not lie to stop the proposed work for failure to publish a subsequent ordinance, which merely ordered the director of public service to enter into a contract for the work with the lowest and best bidder. 537.

Public officials in considering bids for a public improvement are not debarred from determining to use material which is manufactured by only one firm, where such material is not covered by patents, and in the exercise of a reasonable discretion it is accepted as

the best offered for the purpose intended. 537.

Competent engineers may be employed, without competitive bidding, to locate serious water waste, notwithstanding the cost thereof will exceed \$500. 558.

Where the funds to pay for such services are not to be derived from taxation, but from revenue arising from water rents, a certificate from the auditor that the money necessary to meet the obligation is in the treasury and unappropriated is not required. 558.

A subsequent ordinance authorizing the payment of the sum required for such services in excess of \$500, merely grants authority to pay a valid obligation and is itself valid. 558.

Municipally owned property, not employed in the exercise of some governmental function, is not exempt from taxation by the state. 633.

Where a railway is owned and operated by a municipality it is subject to taxation, because necessarily owned in a private or proprietary capacity, and not as a governmental function. 633.

Municipally owned real estate, which has been omitted from the tax duplicate, may be placed thereon by the county auditor. 633.

The tax commission has not been given any control over property belonging to municipal corporations. 633.

The statutory provision for the selling of bonds by a municipality for "erecting or purchasing water works and supplying water to the corporation," is to be read literally and can not be construed as authorizing the sale of bonds to pay rental under a lease of water works not yet constructed. 651.

The provision that any village may contract for the leasing of the water works plant, is an express grant of power to lease such plant; a franchise to construct a water works system may be grant-



ed to an individual, as well as to a corporation, and at substantially the same time the system may be leased for a period of years as provided by Section 3809. 651.

A franchise for the construction, maintenance and operation of a system of water works with authority to lease and include an option at the end of the leased period, is not invalid for uncertainty or unfitness, or as containing more than one subject. 651.

Failure of a contractor to comply with conditions which were waived by council, is not, in the absence of fraud or misconduct, a cause for injunction against performance of the contract, especially where such failure does not result in prejudice to the community. 651.

#### MUTUAL BENEFIT SOCIETIES.

The designation by an unmarried man of his brothers as beneficiaries of a fund payable at his death by a mutual benefit association, is not invalidated or revoked by his subsequent marriage. 568.

#### NEGLIGENCE—

The fact that the owner of property damaged by negligence has received indemnity therefor by way of insurance, can not be pleaded as a defense in an action by the owner against the party causing the damage. 133.

But where the petition of the owner sets up an action which sounds in tort, an averment in the answer that the cause has been assigned to some person unknown to the defendant, and the plaintiff has thereby ceased to be a party in interest, a defense is set up which can not be reached by a motion to strike out. 133.

The fact that the apparatus which caused the accident was free from defect and of approved and standard construction, is not

sufficient to prevent the case being sent to the jury, where there is evidence tending to show that it was located and maintained in a manner that would be easily recognized by prudent operatives as improper and dangerous. 166.

Liability of a traction company to a lady passenger whose dress caught on a projecting brake causing her to be thrown to the street. 166.

Where a chain of negligent acts by different parties resulted in an injury, a trial court will submit to the jury the question whether all of the acts contributed thereto, or if they find only a particular act or acts in the chain of causation caused the injury, they will be asked to specify such act or acts. 201.

Contributory negligence can not be charged against one who was injured by falling into a hole in the street, where it appears that at the time of the accident the hole was filled or partly filled with freshly fallen snow. 249.

Where injuries were received by an employe while assisting the foreman of a tenant of his employer. 307.

Inconsistent averments with reference to the negligence relied on; disregard of the provision of the code requiring a statement of the facts without repetition. 501.

Negligence on the part of a toll road company in leaving a toll gate down at night, without lights or other warning, thereby causing injury to the horse of a traveler, creates a cause of action against the company. 486.

The right of employes to recover on the ground of negligence as it exists at common law is enlarged by the workmen's compensation act, not only by taking away the defenses of the fellow-servant rule, contributory negligence and assumption of risk, but also by making the employer liable in damages for injuries caused by any

wrongful act, neglect or default, gross or slight, which may have caused injuries. 553.

The test of liability of an employer under the workmen's compensation act is not whether the employer exercised ordinary care, but whether he was guilty of any wrongful act, neglect or default which caused the injuries complained of. 553.

The fact that the motorman on an interurban car blew his whistle when one thousand feet from a crossing is not of itself sufficient to warrant the arrest from the jury of the case of one struck by the car at such crossing, but the case should be submitted to the jury on the question whether the negligence of the company was the proximate cause of the injury in view of all the circumstances. 659.

A demurrer does not lie to an answer and cross-petition which denies loss through the negligence of the defendant, and alleges that the loss resulted from a sequence of events put in motion by the plaintiff and the consequences of which might reasonably have been anticipated. 679.

#### NEWSPAPERS—

As to the proper method of listing newspaper for taxation—see TAXATION.

Classification by express company of printed sheets shipped to newspapers in which they are to be incorporated. 403.

#### NEW TRIAL—

The time for filing a motion for a new trial runs from the decision in the case; "decision" of the court and "opinion" of the court distinguished. 244.

#### NOTARY PUBLIC—

The making of an affidavit for replevin before the attorney for the plaintiff as notary renders the affidavit void. 521.

#### NOTICE—

To interested parties is necessary as to a proposed adjourned meeting of a joint board of county commissioners for the purpose of establishing a joint county ditch. 42.

Failure to provide for notice to a railway company of the intention of the municipality to carry a street over its tracks otherwise than at grade and charge one-half of the cost to the road, renders the act under which it is proposed to assess part of the cost against the railway company unconstitutional. 276.

#### NUISANCE—

An action for damages for injuries to a horse resulting from a hole in a public street is an action for a nuisance within the meaning of Section 11626, General Code. 373.

#### OFFICE AND OFFICER—

It is not an offense for a public official to use funds in his custody by law, where no defalcation occurs. 665.

#### PARTIES—

In an action in partition, wives and husbands of tenants in common are not necessary parties. 153.

The president of a corporation, who has been made a defendant both as president and individually to a cause of action against the corporation will be dismissed where no cause of action is stated except against the corporation. 580.

#### PARTITION—

Counsel other than for the plaintiff in a partition case, who perform services which are of benefit to the parties in interest and assist in the determination of

the case, are entitled to share in the fee regularly allowed to counsel for the plaintiff but are not entitled to an extra fee on account of such services. 153.

The wives and husbands of tenants in common are not necessary parties to an action for partition, and counsel whose services consisted in bringing into the case the wives and husbands of the tenants in common in the lands sought to be partitioned are not entitled to share in the counsel fee to be awarded in the case. 153.

A decree or judgment in a partition proceeding, finding the interest and title of the parties thereto, can not be attacked or questioned in a subsequent action or proceeding instituted by any of the parties to the original proceeding, or their privies, so long as the decree in the former action remains unreversed and in full force. 329.

A deed in a partition proceeding is the deed of all the parties thereto, and the purchaser may be regarded as the grantee of said parties, and the conveyance completely extinguishes all title and interest of said parties. 329.

A party who voluntarily takes the benefits of a judgment or decree in partition will not be permitted in a subsequent proceeding to question the validity of the proceedings. 329.

#### PHYSICIAN AND SURGEON—

Where a trial judge has ordered that one of the parties to the suit submit to a physical examination, the physician making such examination can not claim privilege, but may be required to testify as to the condition of such party. 161.

#### PLEADING—

The proper procedure for the vacating of a judgment after term is by motion rather than by petition. 49.

In a suit in attachment directed against the excess over ninety per

cent. of the personal earnings of an unmarried man; necessary averments of the affidavit. 73.

Necessary allegations in an action against a landlord for injury to a tenant, based on defective condition of premises and fraudulent concealment thereof. 98.

Where a petition sets up an action which sounds in tort the cause is assignable, and an averment in the answer that the cause has been assigned to some unknown person and the plaintiff has by that act ceased to be a party in interest, constitutes a defense which can not be reached by a motion to strike out. 133.

In an action for damages for shortage of land conveyed under a deed of general warranty by metes and bounds, the mere statement of the breach is not enough, but the fact or facts which show the breach must be alleged. 215.

Pleading in an action by a liquor dealer who has retired from business and seeks to recover a refund for Dow tax paid. 230.

A petition in mandamus to compel a board of county commissioners to award a contract to the relator must allege that the conditions precedent to the award of the contract have been performed by the board. 246.

An averment in the answer that the plaintiff was injured through her own negligence and carelessness is not an averment of contributory negligence. 249.

A court has inherent power to grant leave to file a reply at any stage of the proceedings; where a case is tried on the theory that a reply has been filed traversing the allegations of the answer, judgment will be entered on the verdict as though the reply had been filed before the verdict was returned. 249.

Allegations sufficient to save a plaintiff from the rule denying to the time of the breach, without giving all of the modifications re-

a mere volunteer the right to maintain an action for injuries. 307.

An allegation of an agreement is often an allegation of mixed law and fact, and it is sufficient to allege the agreement as it was at sulting in the ultimate agreement. 364.

Essential allegations can not be reached by a motion to strike out; brevity is essential, but should be subordinated to the purposes of the code; facts excusing non-performance are not immaterial or irrelevant; election can not be required as between allegations of fact. 364.

Pleading of evidential and ultimate facts and of inconsistent allegations of fact in the alternative. 364.

An intervening petition is the proper pleading for counsel for a receiver to file for recovery of compensation for services rendered to the receiver. 425.

An allegation by an existing telephone company that it is rendering adequate service in the field of its operation, where not supported by any evidence and traversed by the answer of the defendant, requires a judgment in favor of the defendant on that issue. 429.

An amended petition filed on appeal, which states a cause of action different from that tried below, is subject to dismissal. 470.

Necessary allegations in an action by a property owner for damages resulting from the bursting of a sewer during high water. 467.

The disposition of pleaders to follow the common law method, and in an action for personal injuries allege every conceivable form of negligence possible under the circumstances of the case, is in direct contravention of the provision of the code, which requires a statement of the facts without repetition. 501.

Where a specific charge of negligence is not coupled with any of the facts alleged in the general charge of negligence, and is inconsistent with the facts so alleged, it will be stricken from the petition. 501.

In an action by a minor through his next friend for personal injuries, items of expense for board, lodging and medical care are open to a motion to strike from the petition. 599.

By a defendant in an action for loss from negligence which resulted from a sequence of events. 679.

#### POLICE—

Will not be enjoined against interference with a legitimate business, where it is charged that the business so carried on is a cloak for gambling, and the testimony tends to establish the charge. 137.

#### POLICE COURT—

See COURTS.

#### POLICE POWER—

Where the police power of the state is bartered away by a city council in granting a street railway franchise, the grant is invalid. 81.

#### PRESUMPTION—

A presumption arises against intestacy as to any part of the estate of one leaving a will. 613.

#### PRIVILEGE—

See PHYSICIAN AND SURGEON.

#### PROMISSORY NOTES—

Where judgment has been taken on a cognovit note, and the accommodation makers were not accorded the right to be certified as surety in the judgment on the note, a court is authorized to exercise its discretion as to permitting the judgment to be opened up. 49.

Executed by a decedent and made payable to his housekeeper one day after his death, held not to have been gifts without consideration. 186.

As to release of an endorser from liability under an agreement perhaps purposely made indefinite. 259.

#### PROSTITUTES—

Prosecution of the keeper of a dram shop for permitting prostitutes to resort to the place; knowledge on the part of the keeper of the character of habitues; degree of proof required as to the character of such habitues. 508.

Definition of a "common prostitute"; character of evidence required to place a woman in that class; proof should be based upon character rather than reputation. 508.

#### PROXIMATE CAUSE—

See NEGLIGENCE.

Where the negligent acts of several parties result in an injury, one of the parties will not be dismissed from liability therefor on the ground that the proximate cause of the injury was the act of some other party, but it will be left to the jury to find which act or acts, or whether all the acts in the chain of causation, resulted in the injury. 201.

#### PUBLICATION—

Of determining ordinance relating to a public improvement; what ordinance will be regarded as the determining ordinance. 537.

Affidavit for, in an action for attachment can not be assisted by the affidavit for attachment or by the petition, but must be sufficient in itself for the purpose which it fulfills. 546.

Notice must be by publication in an action for divorce, where the defendant is a non-resident of the state; there is no provision for personal service. 550.

#### PUBLIC POLICY—

Having in view the encouragement of trade, public policy is tending to relax the old rule as to trade fixtures. 27.

#### PUBLIC UTILITIES—

Construction of the public utilities act with reference to the extension of telephone lines into territory already occupied. 61.

#### PUBLIC UTILITIES COMMISSION—

Certificate from, not necessary for a telephone company which is proposing to do a private business only. 429.

#### QUIA TIMET—

See TITLE.

Actions *quia timet* can not be invoked to create title, but are available only to those having title. 233.

#### RAILWAYS—

See STREET RAILWAYS and INTERURBAN RAILWAYS.

In an action on a bill of lading, a court will not consider a usage or regulation affecting the mode or place of delivery, with reference to which it is claimed the shipper contracted, where such usage or regulation appears to have been unreasonable in its operation and contrary to public policy. 65.

A railway company is liable for the loss of a car load of apples, rendered unsalable by rough handling, freezing, bruising and mixing in being transferred from a closed car to an open stock car, and long delay on the road. 65.

The moving of dirt by a railway company from one point on its line to another, for the purpose of constructing a yard or fill, constitutes "traffic" within the meaning of Section 8950, requiring that all cars used in moving state traffic be equipped with automatic couplers. 145.

The use of cars equipped with couplers of the character specified by the statute, except that they will not couple by impact, sub-

jects the company to forfeitures as provided by Section 8965, relating to couplers out of repair, rather than to forfeitures provided in Section 8954, relating to cars which have not been equipped with couplers. 145.

The purpose of the automatic coupler act is protection to train operatives; the acts of 1902 and 1906 harmonized. 145.

An action by a stockholder to enjoin the acquisition of stock in another railway on the ground that such acquisition would be *ultra vires* is an action for protection of the property rights of the stockholder, and the company whose stock it is proposed to acquire is not a necessary or proper party. 217.

The provision for building highways across existing railways otherwise than at grade, one-half the cost to be charged to the railway and one-half to the municipality, is unconstitutional and void. 276.

Liability of a railway company for live stock killed by trains is not defeated by an agreement by the predecessor in title with the railway company to build and maintain a right-of-way fence, in the absence of an averment by the railway company that compensation for the building of the fence was taken into account and made a part of the consideration to be paid the land-owner by the railway company at the point where the stock was killed. 497.

Railway viaduct and terminals, owned by a municipality, held to be subject to taxation. 633.

Companies whose line of road is under lease are nevertheless subject to the Willis tax law, when. 671.

#### RECEIVER—

Duty of, with reference to returning for taxation property in his hands, where he is acting as receiver of a corporation in process of dissolution. 321.

A court having charge of a receivership will grant leave to counsel to file an intervening petition for recovery of compensation for services rendered to the receiver, but will refuse leave to file separate action at law against the receivership. 425.

#### RELEASE—

Of an endorser from liability, under an agreement perhaps purposely made indefinite; estoppel; injunction against levy of execution. 259.

#### REFERENCE—

As to time for filing exceptions to report of referee. 386.

#### REFUNDER—

See TAXATION.

#### REMAINDERMEN—

Consideration of the Massachusetts and the American rules as to distribution between life tenants and remaindermen. 1.

#### REMITTITUR—

A trial judge has plenary power in case of an excessive verdict to grant to the plaintiff the option of either a new trial or accepting a remittitur. 169.

Damages as returned against an installment house for unwarranted seizure of household goods, reduced by the court. 473.

#### REPLEVIN—

The making of an affidavit for replevin before the attorney for the plaintiff as notary renders the affidavit void, and a writ based on an affidavit so made must be dismissed. 521.

#### REPUTATION—

The practice of seeking to establish lewdness on the part of women by the testimony of police officers as to reputation, without further testimony as to the facts upon which such reputation is based, is to be severely condemned. 508.



**RESCISSION—**

Where it is claimed a contract of purchase was induced by undue influence for an inadequate consideration, the remedy is equitable rescission. 33.

Failure to rescind promptly does not entitle the injured party to maintain an action for damages for undue influence in the transaction. 33.

**RESIDENCE—**

Of husband under the homestead exemption statute when his whereabouts are unknown. 105.

**REVIVOR—**

The revivor of an action against a physician for malpractice will be permitted against his executors out of time, where the only objection thereto is negligence in delaying the application and the disadvantage of counsel for the executors in not having the aid of the decedent in preparing their defense. 547.

**ROADS—**

Liability of a toll road company for injury to the horse of a traveler from leaving a toll gate down at night without lights or other warning. 486.

**RULE IN SHELLEY'S CASE—**

See DEVISE.

**SALES—**

Broker liable for loss sustained by an owner of securities who sells them through the broker to an undisclosed principal who defaults. 505.

**SEWERS—**

Necessary allegations in an action against a municipality for damages to adjacent property from the bursting of a sewer during high water. 467.

**SHERIFF AND CONSTABLE—**

Service of process by a special constable, not an elector of the

township in which the action was brought, is ground for discharge of the attachment based upon such service. 73.

**SITUS—**

An action by a stockholder to enjoin a railway merger must be brought in a county having jurisdiction over the company in which the plaintiff holds stock. 217.

**SPECIFIC PERFORMANCE—**

Held not available against an aged woman, and plaintiff remanded to a suit for damages, notwithstanding there was no showing of fraud or undue influence and the plaintiff's only objection against carrying out her agreement to sell was one of sentiment. 271.

**STAIRWAY—**

The recital in a deed "subject to the condition that the owner of the part of the lot herein described construct and keep in repair a passage, stairway and landing not less than three feet in width," held to constitute a covenant running with the land. 478.

**STATUTES CONSIDERED—**

[Where not otherwise stated, reference is to the General Code.]

Section 6537, relating to application for a public ditch where the proposed ditch is to be located in more than one county. 42.

Section 11631, providing when the common pleas court or circuit court may vacate or modify its orders or judgments after term. 49.

Section 8296, designating what person is primarily liable on an instrument. 49.

Section 11624, providing when a defendant shall pay the costs. 59.

Section 614-52, providing that a telephone company shall not be permitted to exercise the right of franchise where another is giving adequate service. 61.

Section 10272, relating to demand in actions. 73.

Section 10253, relating to the affidavit in an attachment proceeding. 73.

Section 1732, providing that a justice of the peace may depute a person to serve process. 73.

Section 3664, providing for the punishment of persons disturbing the good order and quiet of the municipality. 104.

Section 11738, providing what property shall be exempt from levy. 105.

Section 11979, providing for what causes divorce may be granted. 114.

Section 13511, providing proceedings where no plea of guilty is entered. 119.

Section 6083, providing for statement of liquor seller in return made for purposes of taxation. 121.

Section 13219, providing a penalty for false answers by liquor seller in statement to assessors. 121.

Section 8950, relating to automatic couplers. 145.

Section 8954, relating to forfeitures under the railway coupler act. 145.

Section 8965, also relating to forfeitures under the railway coupler act. 145.

Section 11497, providing that an adverse party may be examined. 161.

Section 12381, limiting to three years the time within which misdemeanors may be prosecuted. 199.

Section 13432, providing that when imprisonment is a part of the punishment, a jury shall be impaneled. 254.

Section 8897, relating to highway crossings over railway tracks. 276.

Section 13409, relating to vagrants and vagrancy. 278.

Section 3823, relating to claims by abutting owners for damages on account of street improvement. 209.

Section 6074, relating to refunding orders to those retiring from the liquor traffic before expiration of the year for which the Dow tax is paid. 230.

Section 11578, providing when application may be made for a new trial. 244.

Section 2343, providing that plans and estimates shall be procured by county commissioners before entering into a contract for the work. 246.

Section 3939, relating to the issuance and sale of municipal bonds for the purchase of gas or electric light works. 281.

Section 10213, relating to the interpretation of words. 313.

Section 11945, relating to the powers of a receiver. 321.

Section 3658, providing for preservation of the peace and protection of property. 325.

Section 3664, providing for punishment of those disturbing the public peace. 325.

Section 11626, relating to recovery of costs. 373.

Section 10232, providing in what cases justice of the peace shall have jurisdiction. 373.

Section 10835, relating to errors or mistakes in the account of an executor. 386.

Section 11226, relating to actions on official bonds. 386.

Section 10606, relating to bonds of executors and their conditions. 386.

Section 9320, relating to the powers of gas and water companies. 394.

Section 10128, relating to the laying of pipe lines, etc. 394.

Section 614-1 *et seq.*, known as the public service commission act. 403.

Section 11379, providing how certain issues shall be tried. 409.

Section 11288, providing how service of summons may be made upon a corporation. 423.



Section 8543, relating to the recording of deeds or instruments for the incumbrance of lands. 441.

Section 8546, relating to the release of a real estate mortgage. 441.

Section 2908, R. S., relating to certificates of purchase of lands at delinquent tax sale. 457.

Section 2781, R. S., relating to action by county auditor with reference to false tax returns. 457.

Section 2782, R. S., relating to duty of auditor in case of a false return as to personal property. 457.

Section 2588, relating to correction of errors on tax duplicate. 457.

Section 2590, providing a limitation on refunders of taxes. 457.

Section 5353, relating to property exempt from taxation. 489.

Section 8918, containing provisions relating to fences along railway tracks. 497.

Section 10462, relating to the affidavit in an action for replevin. 521.

Section 11524, providing before whom an affidavit may be made. 521.

Section 11532, designating who may not take depositions. 521.

Section 11356, providing that an affidavit must be signed and certified. 521.

Section 10219, relating to the qualifications of sureties. 532.

Section 10383, relating to bond on appeal from a judgment by a justice of the peace. 532.

Section 10394, providing that the cause of quashing an appeal must be stated in the order of court. 532.

Section 10395, relating to amendments or changes in bonds for appeal. 532.

Section 4228, relating to the publication of municipal ordinances. 537.

Section 11292, relating to service by publication. 546.

Section 11297, relating to personal service out of the state. 550.

Section 11402, relating to revivor by appearance or supplemental pleading. 547.

Section 11410, placing a limitation upon revivor of actions against representatives of deceased defendants. 547.

Section 11411, placing limitations upon revivors of actions in which the plaintiffs are dead. 547.

Section 183, requiring the filing of a statement with the secretary of state as a precedent to the right to do business within the state. 562.

Section 11631, providing when orders or judgments may be modified after term. 562.

Section 1465-60, depriving employers of five or more men of the defense of assumed risk, contributory negligence or fellow-servant rule in case of failure to pay premiums into the state liability fund for injured workmen. 553.

Section 3806, requiring a certificate of the auditor that the necessary funds are on hand and unappropriated before a municipal contract involving the expenditure of money can be entered into. 558.

Section 5399, relating to omissions from tax returns. 633.

Section 3809, giving authority to council to provide light, water, etc. 651.

Section 3939, providing when municipalities may sell bonds. 651.

Section 8573, relating to the order of descent of real estate. 662.

Section 12873, relating to the embezzlement of public money. 665.

Section 5484, *et seq.* 671.

#### STOCKHOLDER—

Whose stock has been forfeited

for failure to pay assessments denied relief, where no complaint was made for many years and until the property of the corporation through lapse of time and for other causes had become valuable. 523.

Preferred as well as common stockholders have a statutory right to examine the books of the corporation at all reasonable times. 580.

#### STREET—

Liability of municipality for injury from falling into a hole in the street; whether the hole was a dangerous defect, a question for the jury; contributory negligence can not be established where it appears that at the time of the accident the hole was filled or partly filled with freshly fallen snow. 249.

Power of a municipality to contract for the use of its streets by a gas company for a consideration. 394.

An action for damages for injury to a horse resulting from a hole in a public street is an action for a nuisance, and a judgment for less than \$100 and more than \$5 does not preclude plaintiff from recovering costs. 373.

Interurban railway denied the right to use one of the streets named in its franchise as a station for loading and unloading freight. 487.

Street closed to travel by the washing out of a bridge; action for damages from the municipality for not restoring the bridge held not to be maintainable where brought by a resident on behalf of all the residents of the part of the city affected thereby. 519.

#### STREET RAILWAYS—

See INTERURBAN RAILWAYS.

An ordinance granting a street railway franchise is invalid, where in making such grant the police power of the state is bartered away as well as the right to legislate in the future upon

topics relating to the public safety and well being. 81.

As to the right to collect two fares for a single continuous journey in the same general direction and within the corporate limits of Cincinnati. 265.

#### STRIKES—

See LABOR UNIONS.

Injunction lies against enforcement of a lockout, where disobedience of the order on the part of an employer would result, under the rules of his organization, in his expulsion therefrom. 297.

A blanket injunction will not be issued against a labor union for the purpose of restraining its unnamed members from committing offenses, nor against individual members of a union except upon hearing; or if the circumstances are such as to require the issuance of such an order without notice, the reason therefor must be of sufficient force to require a journal entry. 311.

#### SUMMONS—

Service of, invalid, where by a constable who is not an elector of the township in which the action was brought. 73.

Return of, will not be set aside, where upon an "agent" of the defendant company within the county in which the action was brought. 78.

An agent of a foreign corporation doing business in this state may be served with summons in any county in the state where he may be found and by process issuing out of any county in the state. 423.

The affidavit for publication, in an action in attachment, can not be assisted by the affidavit for attachment or by the petition, but must be sufficient in itself for the purpose which it fulfills. 546.

In an action for divorce service must be by publication, and not by personal service, where the de-

fendant is a non-resident of the state. 550.

**SURETIES—**

Where the surety on the bond on an appeal from a justice of the peace is not, and was not at the time of the giving of the bond, a resident of the state, a motion lies to dismiss the appeal. 532.

Authority to accept bail does not carry with it authority to decline to accept surety on the sole ground that he is a professional bondsman. 198.

**TAXATION—**

Procedure where a liquor dealer retires from business and asks for a refunder for Dow tax paid; the mere filing of an affidavit with the county auditor, setting forth that on a certain date the affiant did cease to do business and retired therefrom, does not meet the requirement of the statute that the auditor must be "satisfied" the business has in fact been abandoned before he issues a refunding order. 230.

Where a corporation is in court for the purpose of dissolution, the receiver thereof should return for taxation the personalty so coming into his hands, and will be required to pay taxes due and to become due for the current calendar year on the real estate belonging to the corporation. 321.

The powers of the state tax commission operate only upon returns made to it, and therefore a correction in the duplicate made by an auditor before the close of 1910 was not affected by the tax commission act and was a legally authorized correction of the duplicate. 377.

The publisher of a newspaper is not a "manufacturer" in the sense that he is entitled to make a return of his newspaper property for taxation as a manufacturer. 358.

In returning newspaper property for taxation it should be listed at its true value in money and in ascertaining such value good will and earning power should be considered, together with every other fact or circumstance bearing upon the question of value; and this rule is applicable notwithstanding the property may have attained large earning capacity by reason of the ability and skill of its managers individually, and its earnings might be greatly diminished were the management changed. 358.

The provision of Section 2908, R. S., as that section read in the year 1885, that where land is erroneously returned as delinquent and is sold for taxes, the sale shall be void, and the money paid by the purchaser returned to him, authorized a return of the money paid for the certificate of purchase at the time of the delinquent sale only, and does not authorize the refunding of taxes which became due and were paid by the purchaser subsequent to the delinquent sale. 457.

Where an error in apportioning taxes is due to neglect of a legal duty, it is deprived of the character of a mistake in the legal sense, and does not fall into the class which are characterized as clerical errors. 457.

Negligence of the auditor in placing on the tax duplicate in the name of A land which did not belong to him and upon which A paid taxes for a long period, must be treated as a fundamental rather than a clerical error, and an order for the issue of a refunder for taxes so wrongfully charged, and which A paid, can not be granted. 457.

Both chance and peril involved in purchases at tax sale. 457.

The words "public charity" as used in Section 5353 of the General Code, must of necessity be given the same meaning as the

words "purely public charity" where used in the same connection in the state Constitution and in the sixth paragraph of Section 2732, R. S. 489.

Where the property is used for purely public charity, the form or name or character of the organization controlling it is without importance and can in no way affect the question of its taxability. 489.

The property of a gymnasium and athletic club, a corporation not for profit, without capital stock or salaried officers, supported by initiation fees and donations in form of life memberships and to the extent of its facilities open to males of good character and within a certain age, is property devoted to purely public charity and not subject to taxation, where devoted exclusively to the promotion of good health through physical culture. 489.

An action for recovery of a tax assessment is controlled by the six years statute of limitations. 631.

There is no exemption from taxation by implication in Ohio, and no exemption can exist unless found in the statutes in plain, unambiguous words. 633.

Municipally owned property is not exempt in Ohio, unless it is employed in the exercise of some governmental function. 633.

A railroad owned and operated by a municipality, is not employed by it in any purely governmental function, but in the exercise of a proprietary or private function, and is not exempt from taxation by the state. 633.

Section 5399, relating to omissions from tax returns, does not prevent the county auditor from placing on the tax duplicate municipally owned real estate omitted therefrom during previous years. 633.

The act creating a tax commission was not intended to give to

such commission any control over the property of municipal corporations. 633.

A railroad company, incorporated in this state and owning a line of railway which is being operated by another company under a long lease, is not relieved by reason of such lease from payment of the annual franchise fees provided by the Willis law, where it continues to maintain its corporate organization, collects rents, pays dividends, and issues stock and bonds from time to time for extensions, betterments and re-funding operations. 671.

Why certain classes of corporations are exempt from the Willis law tax; meaning of the phrase "engaged in business." 671.

#### TELEPHONES—

The public service commission of Ohio has full authority to regulate the extension of telephone lines into territory covered by the charter rights of the company proposing to make such extensions, where such territory is already occupied by the lines of another telephone company. 61.

A certificate from the Public Utilities Commission is not necessary for a company proposing to do a private business only; proof of incorporation of the company and the purchase of some instruments, poles, wire, etc., is not sufficient to sustain an allegation that the company is about to exercise a franchise and engage in the public service, as distinguished from providing private lines for the use of stockholders and others residing within a short distance. 429.

An allegation by an existing telephone company that it is rendering adequate service in the field of its operation, where not supported by any evidence and traversed by the answer of the defendant, requires a judgment in favor of the defendant as to that issue. 429.

It is not contempt of court for persons who have been enjoined from entering into the telephone business to communicate with each other over private lines, which are not connected with any switch-board and are only capable of serving except on each particular wire. 429.

**TENANTS IN COMMON—**

Wives and husbands of tenants in common in lands sought to be partitioned are not necessary parties to the action in partition. 153.

Can not maintain an action to quiet their title as against a co-tenant and his creditors on the ground that he is also indebted to the estate of the decedent from whom they all derive title. 233.

**TIME—**

The beginning of a new fiscal year does not invalidate proceedings for an issue of municipal bonds, begun "in the fiscal year," when. 281.

**TITLE—**

A wife does not take a title in fee simple, but a life estate only, under a devise for life with power to sell and consume. 193.

Inherited title not divested by indebtedness of the heir to the decedent. 233.

Co-tenants by inheritance can not maintain an action against one of their number, who is a debtor to the estate, to quiet their title in the lands of the decedent as against him and his creditors other than the estate. 233.

A deed by a sheriff in a partition proceeding is the deed of the parties to the partition and the purchaser is their grantee, and all title and interest in the property is transferred to said purchaser. 329.

Where a purchase money mortgage has been executed and delivered to the grantor of the lands conveyed, a reconveyance of the

lands to him by the grantee does not cause the greater and lesser estates to meet in him and thus effect a merger, where the mortgage was not surrendered by him upon receiving the reconveyance or at any time thereafter, but had been assigned and thus passed into the possession of third parties. 441.

Where there has been a failure to record the assignment of a mortgage, a subsequent purchaser of the land in good faith for full value without notice of the assignment takes title free from the lien of the mortgage in the hands of the assignee. 441.

As between an innocent purchaser of land and the assignee of a mortgage the assignment of which has not been recorded, the act of negligence causing the conflict of interest was the failure to record the assignment, and the equity of the purchaser of the land is first in time and superior in merit. 441.

**TOLL ROADS—**

See ROADS.

**TORTS—**

Where a chain of negligent acts by different persons result in an injury, it is for the jury to find, in an action where all are made parties, which act or acts caused the injury or whether it was the result of all the acts complained of. 201.

An Ohio court will not take jurisdiction in an action for malicious arrest in another state, where a similar action is pending in that state on account of the same tort. 222.

**TRIAL—**

Whether the hole in the street which caused the accident was of sufficient size to constitute a dangerous defect, held to have been a question for the jury. 249.

A court has power to permit the filing of a reply after the re-

turn of the verdict, when. 249.

In an action growing out of the collision of an automobile with an interurban railway car at a road crossing, the question of proximate cause is one for the jury. 659.

#### TRUSTS—

Questions relating to the final distribution of an estate where the testator placed stocks in trust which increased enormously in value through segregation of surplus earnings. 1.

A trust is terminated by the death of the trustee, and the relation of debtor and creditor thereupon arises, and where the beneficiaries under the trust neglect to demand an accounting by the representative of the trustee, or to file claims with him, the statute of limitations runs against them, and all the restrictions which apply to the filing of claims against the estate of a decedent also obtain against them. 326.

#### UNDUE INFLUENCE—

Allegations of, where an exchange of property was effected with an aged man on an unfair basis of value. 33.

#### VAGRANCY—

The statute defining vagrancy and providing for the fining and imprisonment of vagrants, is indefinite to a degree which renders its enforcement impracticable, and is in violation of the inalienable right to liberty clause of the Bill of Rights, and for that reason both the statute and the Cincinnati ordinance enacted thereunder are unconstitutional. 278.

#### VERDICT—

A trial judge has plenary power in case of an excessive verdict to grant either a new trial or the option to the plaintiff of accepting

a remittitur, and this may be done independent of the grounds for a new trial set out in the statute. 169.

Will be regarded as against the evidence in a ditch improvement proceeding, where the jury misapprehended the instruction of the court and returned a verdict which was not based upon any evidence. 585.

#### VOLUNTEER—

Where a plaintiff, suing for damages for injuries, names his employer and a tenant of his employer as defendants, and alleges that the injury occurred while he was assisting the foreman of the said tenant, and that the assistance was being rendered at the request of the said foreman, and that it was beneficial to his own employer in his capacity as owner of the premises, a demurrer interposed by the said tenant does not lie on the ground that the plaintiff at the time of the accident was acting as a mere volunteer. 307.

#### WILLIS TAX LAW—

A railway company whose line of road is under lease to another company for a long period is subject to the Willis tax law, when. 671.

#### WILLS—

In an action to construe a will the question of the competency of witnesses will be limited to matters pertaining to the estate, without regard to the fact that such witnesses may be interested adversely in the final distribution. 1.

Where the question of the legal domicile of a testator is in doubt, and it does not appear that at the time of his removal from Ohio it was his permanent residence, and from the facts as presented the probate court might well have reached the conclusion that at the



time of his death the testator was a resident of Ohio, the question of his residence can not be subsequently raised in an action to construe his will, and distribution of the estate will be made under the law of Ohio. 1.

By the term "lawful heirs" as used in the will under consideration the testator referred to brothers and sisters of both his wife and himself as a class, and the gifts under his will were direct, and distribution should be made among those living at the time of his own death and the death of his wife respectively *per stirpes*. 1.

A devise of property to wife for life, with power to sell and consume, is a devise of a life estate only. 193.

As to construction of the devise to A C "for the term of her natural life, and at her decease to go to the heirs of her body in fee." 329.

The rule in Shelley's case is a rule of property, and not a rule of construction to be applied in the determination of the meaning of language in a grant or devise. 329.

Where a provision in a will is doubtful, or equivocal or uncertain as to its meaning, the terms of the residuary clause will be so construed as to prevent intestacy. 613.

The doctrine of *ejusdem generis* is limited in its application to clauses not residuary, and the word "effects," as used in the will under consideration, is therefore not limited to property of the same general character and description as the "household goods" theretofore referred to. 613.

A residuary clause may be followed by other bequests. 613.

A partial will is, almost un-

known, and a presumption arises against intestacy as to any part of the estate of one leaving a will. 613.

#### WORDS AND PHRASES—

Meaning of the term "lawful heirs" as used in a will. 1.

Meaning of the words "living together" as applied to husband and wife. 105.

Meaning of the word "traffic," as used in the automatic coupler act. 145.

Meaning of the words "public accommodation" as used in the civil rights statute. 313.

Definition of the words "public charity" and "purely public charity," as used in the statutes relating to taxation. 389.

A newspaper publisher is not a "manufacturer." 358.

Meaning of the word "effects" as used in the will under consideration. 613.

Meaning of the phrase "engaged in business" as used in the excise law. 671.

#### WORKMEN'S COMPENSATION ACT—

This act enlarges the basis for recovery on the ground of negligence as it exists at common law, not only by taking away the defenses of the fellow servant rule, contributory negligence and assumption of risk, but also by making such employer liable in damages for injuries caused by any wrongful act, neglect or default, gross or slight, which causes such injuries. 553.

The test of liability under this act is not whether the employer exercised ordinary care, but whether he was guilty of any wrongful act, neglect or default which caused the injuries. 553.

Q. 15.  
5/13/13

3073 015







**HARVARD LAW LIBRARY**